Supreme Court, U.S.
FILED

02 - 16 JUN 2 8 2002

OFFICE OF THE CLERK

No. ____

In the Supreme Court of the United States

ALFRED L. STONE
Petitioner,

v.

CITY OF INDIANAPOLIS PUBLIC UTILITIES DIVISION, D/B/A CITIZENS GAS & COKE UTILITY, ET AL.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

ALFRED L. STONE
Petitioner pro se

6735 SPARROWOOD DRIVE
INDIANAPOLIS, IN 46236
(317) 823-3528

Petitioner pro se

BECKER GALLAGHER LEGAL PUBLISHING, INC.,
CINCINNATI, OHIO 800-890-5001

113PS

QUESTIONS PRESENTED

1. Was it error for the Court of Appeals, without explanation, to fail or refuse to rule on the issue of whether Title 42 Sec. 1981 as amended encompasses a retaliation claim in the post Patterson era.

2. Was it error for the Court of Appeals to conclude that res judicata was applicable to the Petitioner's Title 42 Sec. 1981 preclusion argument in the within action, when the previous appeal did not state a claim under Sec. 1981.

3. Was it error for the Court of Appeals to overlook this court's ruling that the McDonnell-Douglas analysis is inapplicable when direct evidence of discrimination exist.

4. Was it error for the Court of Appeals to uphold the District Court's cost award to the Respondents; because, that cost included a deposition that was held without leave of the court and beyond the discovery deadline date.

PARTIES TO THE PROCEEDING

Alfred L. Stone, Petitioner and Plaintiff-Appellant below, was an hourly employee for the Service & Rental Center, LLC from September 23, 1996 to August 26, 1997.

Respondent, Defendant-Appellee below, the Service & Rental Center, LLC. was a subsidiary of Citizens By-Products Coal Company, who in turn is a subsidiary of Citizens Gas & Coke Utility, who in turn is a d/b/a/ of the City of Indianapolis Public Utilities Division.

TABLE OF CONTENTS

I. QUESTIONS PRESENTED FOR REVIEW i

II. PARTIES TO THE PROCEEDINGS ii

III. TABLE OF CONTENTS . . . . . iii-v

IV. TABLE OF AUTHORITIES . . . . . vi-ix

V. OPINIONS BELOW 1

VI. JURISDICTION 1

VII. STATUTES INVOLVED 2

VIII. STATEMENT OF THE CASE 2

Statement of Facts 2-3

Description of Proceedings Below 3-5

ARGUMENT 6-15

A. The Court of Appeals for the Seventh Circuit failed or refused to decide the issue of whether an at will employee can bring a cause of action for retaliation under Title 42 Section 1981 as amended 6

B. The Court of Appeals erroneously concluded that petitioner's discrimination claims under Title 42, Section 1981(a) were barred because the same argument was determined in a previous appeal between the same parties 9

C. The Court of Appeals erroneously applied the Burden Shifting Analysis, as opposed to the Direct Evidence Analysis, to the petitioner's Section 1981 retaliation claim 12

D. The Court of Appeals erroneously upheld the district court's award of cost to the respondents for a deposition that was held without the leave of the court, and after discovery was closed 14

X. CONCLUSION 15

XI. APPENDIX 1a

Appendix A- United States Court of Appeals for the Seventh Circuit in Alfred L. Stone v. City of Indianapolis, d.b.a. Citizens Gas et al, Case No. 01-3210, filed April 1, 2002, denying en banc hearing 1a

Appendix B- United States Court of Appeals for the Seventh Circuit in Alfred L. Stone v. City of Indianapolis, d.b.a. Citizens Gas et al, Case No. 01-3210, filed February 19, 2002, unpublished opinion 3a

Appendix C- United States Court of Appeals for the Seventh Circuit in Alfred L. Stone v. City of Indianapolis, d.b.a. Citizens Gas et al., Case No. 01-3210, filed February 19, 2002, published opinion 13a

Appendix D- United States District Court Memorandum of Law and Order in Alfred L. Stone v. City of Indianapolis Public Utilities Div., et al, Case Num. IP 98-190-C, granting summary judgment in favor of the Defendants on March 30, 2001 . . . . . 20a

Appendix E- United States Court of Appeals for the Seventh Circuit in Alfred L. Stone v. City of Indianapolis Public Utilities Div., et al, Case No. 00-2356, filed October 23, 2000, unpublished opinion 65a

Appendix F- Administrative Law Judge Robert K. Robisch's written decision that Alfred L. Stone was not discharged for just cause by the Service & Rental Center on August 26, 1997 . . 76a

Appendix G- Affidavits of David Phelan and Jeanine McDaniels, filed on January 10, 2000 . . . . . 82a

TABLE OF AUTHORITIES

DECISIONS

United States Supreme Court

Aetna Life Ins. Co. v. Dunkun
266 U.S. 389, 45 S.Ct. 129, 69 L.Ed. 342 7

Anderson v. Libby Lobby Inc.
477 U.S. 242 (1986) 9

Bradley v. School Bd. Of City of Richmond
416 U.S. 696 (1974) 8

Communist Party of Indiana v. Whitcomb
414 U.S. 441 (1974) 5

Evans v. Newton
383 U.S. 296 8,12

F.T.C. v. Colgate-Palmolive Co.
380 U.S. 374 (1965) 5

Furnco Construction Comp. v. Waters
438 U.S. 567 (1978) 8

Hazen Paper Co. v. Biggins
507 U.S. 604 (1993) 12

Matsushita Elec. Industrial Co. v. Zenith Radio Corp.
475 U.S. 574 (1986) 7

Modern v. Woodman of America Mixer
267 U.S. 544 7

Monell v. Dept. of Social Services of City of New York
436 U.S. 658 8,13

Montana v. United States
440 U.S. 147 10

Reeves v. Sanderson Plumbing Products Inc.
530 U.S. 130 (2000) 8

Rivers v. Roadway Exp. Inc.
114 S.Ct. 1510 (1994) 9

Southern Pacific R. Co. v. United States
168 U.S. 1 (1897) 10

Trans-World Airline Inc. v. Thurston
469 U.S. 111 (1985) 12

United States v. Bliss
176 U.S. 321 . . . . . 10, 11

United States v. Healy
376 U.S. 75 (1964) 5

University of Tennessee v. Elliott
106 S.Ct. 3220 (1987) 7,8,9,11,13

CIRCUIT COURT OF APPEALS

Andrews v. Lakeshore Rehabilitation Hospital
140 F.3d 1405 (11thCir. 1998) 6

Barber v. Ruth
7 F.3d 636 (7thCir. 1993) 14

Gonzalez v. Ingersoll Milling Machine Co.
133 F.3d 1025 (1997) 7

Lewis v. American Foreign Service Assn.
845 F.Supp. 71 (D.D.C. 1994) 6

Malhorta v. Cotter & Co.
885 F.2d 1305 7

Manildra Milling Corp. v. Ogilvie Mills Inc.
76 F.3d 1178 (Fed.Cir. 1996) 14

Spriggs v. Diamond Auto Glass
242 F.3d 179 (4thCir. 2001) 6

Steverson v. Goldstein
24 F.3d 666 (5thCir. 1996) 6

Stone v. City of Indianapolis Public Util. Div. Et al.
281 F.3d 640 (7thCir. 2002) 1,6,13

INDIANA SUPREME COURT

Frampton v. Central Indiana Gas Co.
297 N.E.2d 425 (1973) 7

STATUTES

28 U.S.C. Section 1254(1) 2

28 U.S.C. Section 1331(a) 1,4

28 U.S.C. Section 1367(a) 2,4

28 U.S.C. Section 2101(c) 1

29 U.S.C. Section 2601 3

42 U.S.C. Section 1981 2,3,4,6,9,10,11,12

42 U.S.C. Section 1983 2,3,6,8,13

42 U.S.C. Section 2000(e) (Title VII) 1,4,10,11

Indiana Code 22-4-12-17(h) 7,8

U.S. CONSTITUTION

14TH Amendment 2

OPINIONS BELOW

The published opinion of the United States Court of Appeals for the Seventh Circuit in *Stone v. City of Indianapolis Public Util. Div. et al.,* 281 F.3d 640 (7thCir. 2002) was filed on February 19, 2002. The unreported opinion No. 01-3210 was also filed on February 19, 2002. Both are included in the appendix at Appendix C at Page 13a, and Appendix B at 4a.

The judgment entry of the District Court for the Southern District of Indiana and the accompanying Memorandum and Order entered on March 30, 2001 in Alfred L. Stone v. City of Indianapolis Public Util. Div. et al., No. IP 98-0190-C, is set forth in the appendix at Appendix D at Page 20a.

JURISDICTION

The Petitioner filed IP 98-0190-C in the United States District Court for the Southern District of Indiana on February 12, 1998; and, on March 30, 2001, the Court ordered summary judgment in favor of the Respondents. The Court of Appeals for the Seventh Circuit affirmed the district court's judgment on February 19, 2002; but, Cause No. 01-3210 was unreported. However, the Court issued a published opinion establishing the law in the circuit for Title VII retaliation claims. *Stone v. City of Indianapolis Public Util. Div. et al.,* 281 F.3d 640 (7thCir. 2002). On April 1, 2002, the Court of Appeals for the Seventh Circuit denied the Petitioner a rehearing, and a rehearing en banc. The petition for writ of certiorari is filed within ninety (90) days from that date. 28 U.S.C. Section 2101(c). The jurisdictional basis for federal jurisdiction in the court of first instance was pursuant to 42 U.S.C. Section 1331 (a). Petitioner also invoked the

District Court's supplemental jurisdiction pursuant to 28 U.S.C. Section 1367 (a) for the state claims. Count III set forth a claim for the violation of I.C. 22-3-2-15 by the Respondents. The jurisdiction of this court is invoked pursuant to the provisions of 28 U.S.C. Section 1254(1).

STATUTES INVOLVED

The statutes involved are 42 U.S.C. Section 1981 as amended and 42 U.S.C. Section 1983, as they relate to the 14th Amendment of the U.S. Constitution.

STATEMENT OF THE CASE

A. Statement Of The Facts:

Petitioner was an at-will employee of the Respondents, having been hired on September 23, 1996. Petitioner worked for Respondents as an hourly service mechanic. The action involves a workers compensation issue of a medically diagnosed back injury, and the Respondent's termination of the Petitioner for enforcing his rights as a result of that injury. The Petitioner injured his back removing a coil from a boiler on July 22, 1997. The jobsite was located in Plainfield IN., and the Petitioner was on overtime when the injury occurred. The Petitioner reported the injury to the Respondents on July 23, 1997. On August 4, 1997, the Petitioner complained about pain in his lower back, and the Respondents ordered him to see his personal physician to obtain a prescription for a back support. The Petitioner complied by visiting the V.A. Hospital that same evening. The emergency room doctor removed the Petitioner from duty for three days, wrote a prescription for the back support, and scheduled further treatment for the back injury. On August 6, 1997, the Petitioner reported to the company doctor and was ordered to

return to work on August 7, 1997 with restrictions. The working agreement between the union and the Respondents did not make provisions for light or restricted duty. On August 7, 1997, the Petitioner filed a claim with Indiana's Workers Compensation Board over the payment of the bill and the nature of his return to work order. On August 13, 1997, the Respondent's doctor ordered the Petitioner to report to work on August 14, 1997 without restrictions. On August 21, 1997, the Petitioner's back injury was aggravated, and the Respondent's Supervisor David Martin removed the Petitioner from his work assignment, and sent him to a job that did not require any lifting. On August 24, 1997, the Petitioner sought medical leave from the Respondents; but, the leave was to commence on October 1, 1997. The Petitioner's probationary period would have ended on September 23, 1997. On August 26, 1997, Thomas Derrow, with the approval of Citizen Gas' V.P. Steve Stark, terminated the Petitioner purportedly because he did not meet their standards. On September 4, 1997, Vickie Barlow, the nurse for Citizen Gas denied the Petitioner medical treatment for his job related injury. On September 18, 1997, Dennis Rosier of Citizens Gas reported to Susan Coley of Indiana's Department of Workforce Development that the Petitioner was terminated because he refused to return to work when released to return to work. As a result thereof, the Petitioner was granted unemployment benefits; and, on November 4, 1997, that decision was upheld by Administrative Law Judge Robert Robisch.

B. Description Of The Proceedings Below:

Petitioner originally filed this action pro se in the United States District Court for the Southern District of Indiana. Petitioner bought a claim against Respondents under Title 29 Sec. 2601, Title 42 Sections 1981 as amended, and Title 42 Section 1983. Upon issuance of a Right to Sue Letter

by the Equal Employment Opportunity Commission, Petitioner filed an amended complaint on August 3, 1998 adding Title VII claims. As the case proceeded to summary judgment, upon motion, the district court dismissed the City of Indianapolis from the lawsuit. On or about March 2000, the Petitioner amended the complaint for the second time to add the City of Indianapolis as a party. Accordingly, jurisdiction of Petitioner's action in the district court was based upon federal question jurisdiction under 28 U.S.C. Section 1331 (a). Jurisdiction of the supplemental Indiana law claims was based upon 28 U.S.C. Section 1367 (a).

On March 30, 2001, the District Court in its Memorandum and Order granted summary judgment to Respondents in all respects, except the workers compensation claims were remanded to Indiana's Worker Compensation Board. The District Court reasoned that the Petitioner could not meet his burden of proof to establish a prima facie case of discrimination for race or age as it relates to promotions or the termination. The District Court reasoned further that the Petitioner could not establish a prima facie case of retaliation under 42 U.S.C. 1981 or Title VII; nor, could the Petitioner establish a wrongful discharge claim to support his state claims.

On February 19, 2002, the United States Court of Appeals for the Seventh Circuit affirmed the District Court in an unpublished opinion. However, the Court of Appeals issued a published opinion that created new law in the circuit for Title VII retaliation claims. The Court of Appeals, without explanation, failed to rule whether 42 U.S.C. 1981 as amended encompasses a retaliation claim in the same opinion. On April 1, 2002, the Court of Appeals denied the Petitioner's request for a rehearing and a rehearing en banc.

Petitioner Alfred L. Stone has duly filed his petition for writ of certiorari within ninety (90) days of entry of the Court of Appeal's ruling denying a rehearing en banc. *Communist Party of Indiana v. Whitcomb*, 414 U.S. 441, 445-446 (1974); *FTC v. Colgate-Palmolive Co.*, 380 U.S. 374, 384 (1965); *United States v. Healy*, 376 U.S. 75, 77-78:80 (1964).

ARGUMENT

A. The Court of Appeals for the Seventh Circuit failed or refused to decide the issue of whether an at will employee can bring a cause of action for retaliation under Title 42 Sec. 1981 as amended.

The question herein reveals confusion among the circuits with respect to whether Title 42 Sec. 1981 as amended encompasses an at-will employee's retaliation claim. In the within action, the Petitioner, an at-will employee, contends that the Respondents terminated him in retaliation for exercising his rights under Indiana's Workers Compensation laws, and under the Family & Medical Leave Act.

In the post Patterson era, few courts have considered whether Sec. 1981 as amended encompasses a claim for retaliation. Without directly addressing the issue, the Fifth Circuit affirmed a jury verdict finding retaliation bought pursuant to 42 U.S.C. Sec. 1981 & 1983. *Steverson v. Goldstein*, 24 F.3d 666, at 670 (5thCir. 1994) cert denied, ____U.S. ____, 115 S.Ct. 731, 130 L.Ed.2d 634 (1995). The United States District Court for the District of Columbia found a retaliation claim under Sec. 1981. *Lewis American Foreign Service Assn'*, 846 F. Supp. 71, at 73 (D.D.C. 1994); The Fourth Circuit holds that retaliation claims are cognizable under 42 U.S.C. 1981, *Spriggs v. Diamond Auto Glass*, 242 F.3d 179, at 190 (4thCir. 2001). The Eleventh Circuit held that Sec. 1981(b) does encompass a retaliation claim. *Andrews v. Lakeshore Rehabilitation Hospital*, 140 F.3d 1405, at 1411-1413 (11thCir. 1998). The Court of Appeals for the Seventh Circuit did not follow the other circuits in deciding that Sec. 1981 as amended encompasses a retaliation claim. *Stone v. City of Indianapolis Public Util.*

Div. Et al., 281 F3d 640 (7thCir. 2002). The Seventh Circuit, in dicta, commented on the issue in the pre Patterson era. *Malhorta v. Cotter & Co.*, 885 F.2d 1305, at 1314. For the record, the Seventh Circuit has not ruled on the issue of whether an employment at will provides a sufficient contractual relationship to support a 1981 claim; *Gonzalez v. Ingersoll Milling Machine Co.*, 133 F.3d 1025, at 1034, (1997); but, Indiana's Supreme Court has. *Frampton v. Central Indiana Gas Co.* 297 N.E.2d 425 (1973).

In the within action, the Court of Appeals erred in concluding that the only direct evidence in the record in support of the Petitioner's retaliation claim was the temporal proximity. According to the record, the Respondents submitted Administrative Law Judge Robert Robisch's November 4, 1997 unemployment claim decision. The decision is binding; and, it holds that the Petitioner was discharged without cause on August 26, 1997. (Appendix F, Pg. 76a thru 81a). In the context of summary judgment, under Rule 56, this court has stated that the district court must review the record "taken as a whole." *Matsushita Elec. Industrial Co. v. Zenith Radio Corp.* 475 U.S. 574, at 587 (1986). In this respect, in a 1983 cause of action, an un-reviewed administrative agency decision precludes that issue in a subsequent action in federal court between the same parties. *University of Tennessee v. Elliott,* 106 S.Ct. 3220, at 3225 (1987); because, federal courts are not bound by the full faith and credit clause. Id., at 3225; and, a state statute (I.C. 22-4-12-17(h)) is a public act under the full faith and credit clause. *Modern v. Woodman of America Mixer*, 267 U.S. 544, 45 S.Ct. 389, 69 L.Ed 783; *Aetna Life Ins. Co. v. Dunkun*, 266 U.S. 389, 45 S.Ct. 129, 69 L.Ed. 342.

In this regard, in the within action, the Court of Appeals overlooked the district court's erroneous application

of I.C. 22-4-12-17(h) to the facts surrounding CMS' reasons for terminating the Petitioner. *Elliott*, at 3225, (Appendix D, Pg. 61a). CMS is a subsidiary of Citizen Gas, and the latter is the registered trademark of the City of Indianapolis, a person under Title 42, Sec. 1983. *Evans v. Newton*, 383 U.S. 296, at 299 & *Monell v. Dept. of Social Services of City of New York*, 98 S.Ct. 2018, 436 U.S. 658, 56 L.Ed.2d 611, (Appendix B, Pg.4a, Fn. 1). The administrative decision in favor of the Petitioner sets aside the Court of Appeal's conclusion that temporal proximity was the only direct evidence in the record in support of the Petitioner's retaliation claim. *Furnco Construction Comp. V. Waters*, 438 U.S. 567, 577 (1978). It is submitted that according to *Elliott*, the issue of the Respondent's termination of the Petitioner should have been precluded from the summary judgment proceedings; 106 S.Ct., at 3225; therefore, the Court of Appeals had a duty to draw a reasonable inference in favor of the Petitioner on the discharge issue. *Reeves v. Sanderson Plumbing Products Inc.*, 530 U.S. 130, at 150 (2000); because, "Federal courts are bound to apply the law in effect at the time its renders its decision." *Bradley v. School Bd. Of City of Richmond*, 416 U.S. 696, at 711, 94 S.Ct. 2006, at 2016, 40 L.Ed.2d 476 (1974).

In this respect, the Respondents did not have a just cause for terminating the Petitioner; therefore, the ultimate question of whether the Petitioner was terminated in retaliation for expressing his rights as an employee; (i.e. filing notice of his intent to file a workers compensation claim, and asking for future medical leave under the Family & Medical Leave Act); was a question for a jury. *Reeves,* at 140. (Appendix D, Pg. 41a thru 42a). It is submitted that the Court of Appeal's rejection of the Petitioner's contention that he was terminated in retaliation for exercising his rights under Indiana's Workers Compensation laws and the Family &

Medical Leave Act was an abuse of discretion; because, "the court made credibility determinations, weighed the evidence, and drew illegitimate inferences from the facts, all jury functions." *Anderson v. Libby Lobby Inc.*, 477 U.S. 242, at 250-251 (1986). The Court of Appeal's divergence from *Elliott*, without explanation, compelled the Petitioner to seek this court's review of his legal argument that the Respondent's reasons for terminating him were precluded because of a previous ruling by an administrative agency on the same issue. *Elliott*, at 3225. (Appendix F, Pg.76a thru 81a & Appendix B, Pg.9a, Fn.2). In this respect, it was error for the Court of Appeals to uphold the district court's decision to grant summary judgment in favor of the Respondents. *Anderson*, at 250-251.

The Petitioner submits that only a few courts of appeal courts have ruled on the issue of whether Title 42 Sec. 1981 encompasses a retaliation claim in the post Patterson era. Nevertheless, the Court of Appeals for the Seventh Circuit refuses to rule on the issue, and refuses to do so without explanation. It is submitted that the courts desperately need the guidance of the nation's highest court on this issue; because, the question of defining Title 42, Sec. 1981 as amended in the post Patterson era is the responsibility of this court. *Rivers v. Roadway Exp. Inc.*, 114 S.Ct. 1510, at 1519 (1994).

B. The Court of Appeals erroneously concluded that petitioner's discrimination claims under Title 42 Sec. 1981(a) were barred because the same argument was determined in a previous appeal between the same parties.

The question herein reveals confusion in the Seventh Circuit on the issue of what constitutes claim preclusion in a second cause of action between the same parties. In this

respect, the Petitioner submits that the previous appeal is void of a Title 42 Sec. 1981 claim; therefore, there was no final ruling issued by the district court to be appealed to the Court of Appeals. (Appendix E, Pg.65a thru 75a)

A fundamental precept of common law adjudication, embodied in the related doctrines of collateral estoppel and res judicata, is that a "right, question or fact distinctly put in issue and directly determined by a court of competent jurisdiction...cannot be disputed in a subsequent suit between the same parties or their privies..." *Southern Pacific R. Co. v. United States*, 168 U.S. 1, at 48-49 (1897), as stated in *Montana v. United States*, 440 U.S. 147, at 153.

In the within action, the Court of Appeals erroneously concluded that the Petitioner's argument that a conclusive effect to the finding of his state unemployment compensation proceeding applied to his racially motivated discharge claim under Title 42, Sec. 1981. (Appendix B, Pg.9a, Fn.2). The Court of Appeals agreed with the district court on the issue that the Respondents did not discharge the Petitioner because of his race under various causes of action. (Appendix B, Pg.7a). However, the Court of Appeals overlooked the ultimate fact that the Petitioner did not plead a Sec. 1981 claim in the previous appeal; and, the same court withheld judgment on the Petitioner's race claim under Title VII. (Appendix E, Pg. 65a thru 75a). If a party neither pleads nor proves what has been decided by a court of competent jurisdiction in some other case between himself and his antagonist, he cannot insist upon the benefit of res judicata and this although such prior judgment may have been rendered by the same court. *United States v. Bliss*, 172 U.S. 321, at 326, (quoting, *Southern Pacific Railroad v. United States*, 168 U.S. 1, at 48-49).

In the previous appeal, the Court of Appeals ruled that *Elliott* was not applicable to the Petitioner's Title VII retaliation claim; (Appendix E, Pg.74a;) but, in the within action the court erred when it applied the same ruling to the Petitioner's racially motivated discharge claim under Title 42, Sec. 1981. (Appendix B, Pg.9a, Fn2) 106 S.Ct., at 3225. In this respect, it is submitted that in the within action claim preclusion does not apply to the Petitioner's Sec. 1981 racially motivated discharge claim because in the previous appeal the Court of Appeals did not rule on a Sec. 1981 claim. *Bliss*, at 326, (Appendix E, Pg. 65a thru 75a & Appendix B, Pg.9a, Fn2).

Contemporaneously, according to the Court of Appeals, the final judgment that was entered by the court on the Petitioner's Title VII retaliation claim in the previous appeal is inapplicable to the retaliation claims under Title VII and Sec. 1981 in the within action because the Respondents failed to raise claim preclusion as a defense to the district court. (Appendix B, Pg. 9a, Fn.3).

In this respect, it is submitted that in the within action the Court of Appeal's application of the doctrine of claim preclusion to the Petitioner's Sec. 1981 racially motivated discharge claim was an error. (Appendix B, Pg.9a, Fn.2 & Appendix E, Pg. 73a thru 74a). If a party neither pleads nor proves what was decided by another court, a defense of res judicata is not available. *Bliss,* at 326. Accordingly, the Petitioner should be allowed to go to trial on his racially motivated discharge claims in the within action because he submitted two (2) affidavits in support of his contention that the Respondents treated white employees with back injuries and white probationary employees with disciplinary problems more favorably than blacks. (Appendix G, Pgs. 82a, Par. 8 & Pg. 86a, Par. 6 & Pg. 87a, Par. 7 thru 9 & Appendix E, Pg.

74a). The respondents did not rebut the evidence; therefore, it is submitted that because the Petitioner alleges disparate treatment, "liability depends on whether the protected trait (under Sec.1981, race) actually motivated the employer's decision." *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 610 (1993). Furthermore, without a just cause for termination, more likely than not, race may have played a part in the Respondent's decision to terminate the Petitioner on August 26, 1997.

The Petitioner prays that this court will hear his argument on this issue and clarify the meaning of claim preclusion for the Court of Appeals for the Seventh Circuit.

C. The Court of Appeal erroneously applied the Burden Shifting Analysis, as opposed to the Direct Evidence Analysis, to the petitioner's Sec. 1981 retaliation claim.

In the within action, it is submitted that the Court of Appeals erred when it applied the McDonnell-Douglas analysis, instead of the direct evidence rule, to the facts surrounding the Petitioner's retaliation claims.

First and foremost, according to this court; "When private individuals or groups are endowed by the state with powers or functions governmental in nature, they become agencies or instrumentalities of the state and subject to its constitutional limitations." *Evans v. Newton*, 383 U.S. 296, at 299; and secondly, "The McDonnell-Douglas test is inapplicable where the Plaintiff presents direct evidence of discrimination." *Trans-World Airline Inc. v. Thurston*, 469 U.S. 111, at 112, 105 S.Ct. 613, 83 L.Ed.2d 523 (1985).

According to the record in the within action, the respondents sent the Petitioner to see his doctor on August 4, 1997. (Appendix D, Pg. 39a thru 40a); On August 7, 1997, the Petitioner filed notice of his intent to file a workers compensation claim with the board because of a dispute with his employer. (Appendix D, Pg. 41a thru 42a); On August 24, 1997, the Petitioner submitted a memo entitled "Request for Leave under the Family & Medical Leave Act." (Appendix D, Pg. 42a); The Petitioner never received any written warnings during his tenure of employment, but white probationary employees received the benefit of written warnings and were not terminated. (Appendix E, Pg.74a & Appendix G, Pg. 82a thru 88a); On November 4, 1997, Administrative Law Judge Robert Robisch upheld the deputy claims agent's ruling that the Petitioner was discharged without just cause on August 26, 1997. (Appendix F, Pg.76a thru 81a). According to this court, in a 1983 cause of action, an unreviewed administrative finding precludes that issue in a federal court between the same parties. *Elliott*, 105 S.Ct. 3220, at 3225. It is submitted that CMS is a subsidiary of Citizen Gas, the registered trademark of the City of Indianapolis; therefore, Citizen Gas is a person under Title 42, Sec. 1983. *Monell*, 98 S.Ct. 2018, (Appendix B, Pg.4a, Fn. 1)

In this respect, the record will support a jury question of whether the Respondents retaliated against the Petitioner for expressing his rights under Indiana's Workers Compensation laws, and the Family & Medical Leave Act. The question of how much evidence needs to be presented to establish a triable issue to a court is not susceptible of a general answer in the appeal courts. *Stone v. City of Indianapolis Public Utilities Division et al*, 281 F.3d 640, at 644 (7thCir.2002). The circuits are divided on the issue;

therefore, they desperately need the guidance of this court to resolve the conflict. *Id.*, at 644

D. The Court of Appeals erroneously upheld the district court's award of cost for a deposition that was held without the leave of the court and after discovery was closed.

In the within action, the district court awarded the Respondents the cost of a deposition that was taken after discovery was ordered closed, and without leave of the court. (Appendix D, Pg.63a). The Court of Appeals upheld that ruling. (Appendix B, Pg.12a). It is submitted that the district court abused its discretion because the court granted summary judgment based upon the facts known by the respondents prior to the November 10th, 1997 deposition. The facts obtained in the previous depositions were relied upon to decide the summary judgment motion; hence the Respondent's actions beg the question of whether the November 10th deposition was necessary to make a finding or to dispute a claim raised by the Petitioner. The determination of necessity must be made in light of the facts known at the time of the deposition. *Barber v. Ruth*, 7 F.3d 636, at 645 (7thCir.1993) (quoting *Hudson*, 758 F.2d, at 1243). It is submitted that the question for review by this court is "whether the depositions reasonably seemed necessary at the time they were taken." *Manildra Milling Corp. v. Ogilvie Mills Inc.*, 76 F.3d 1178, at 1184. (Fed.Cir.1996) (citing 10 Charles A. Wright, Arthur Miller & Mary Kay Kane, Federal Practice and Procedure Sec. 2676, at 351 (2d ed. 1983). The record does not support a necessity, and if it did, the Respondents had a duty to seek leave from Judge Hamilton to hold the deposition.

CONCLUSION

For reasons set forth in this Petition for Writ of Certiorari, Petitioner Stone respectfully requests that a writ issue as prayed for in order to review the aforementioned Seventh Circuit Opinions set forth in Appendix A, B, C, and E.

Respectfully Submitted,

Alfred L. Stone, pro se
6735 Sparrowood Dr.
Indianapolis, IN 46236
(317) 823-3528

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 01-3210

[Filed April 1, 2002]

ALFRED L. STONE,	)
Plaintiff-Appellant,	)
	)
v.	)
	)
CITY OF INDIANAPOLIS	)
PUBLIC UTILITIES DIVISION,	)
d/b/a CITIZENS GAS & COKE	)
UTILITY, et al.,	)
Defendants-Appellees.	)
	)

Appeal from the United States District Court
for the Southern District of Indiana,
Indianapolis Division
No. IP 98-0190-C-H/G
David F. Hamilton, Judge

JUDGES:
Before Hon. Richard A. Posner, Circuit Judge, Hon. Daniel A. Manion, Circuit Judge, Hon. Ilana Diamond Rovner, Circuit Judge.

ORDER

On March 5, 2002 plaintiff-appellant filed a petition for rehearing and petition for rehearing *en banc*. All the judges on the original panel have voted to deny the petition, and none of the active judges has requested a vote on the petition for rehearing *en banc*. The petition is therefore **DENIED**.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 01-3210

**[Submitted December 18, 2001*
Decided February 19, 2002]**

ALFRED L. STONE,
Plaintiff-Appellant,

v.

CITY OF INDIANAPOLIS
PUBLIC UTILITIES DIVISION,
d/b/a CITIZENS GAS & COKE
UTILITY, et al.,
Defendants-Appellees.

Appeal from the United States District Court
for the Southern District of Indiana,
Indianapolis Division
No. IP 98-0190-C-H/G
David F. Hamilton, Judge

* After an examination of the briefs and the record, we have concluded that oral argument is unnecessary. Thus, the appeal is submitted on the briefs and the record. *See* Fed. R. App. P. 34(a)(2).

JUDGES:
Before Hon. Richard A. Posner, Circuit Judge, Hon. Daniel A. Manion, Circuit Judge, Hon. Ilana Diamond Rovner, Circuit Judge.

ORDER

Alfred Stone filed suit against the City of Indianapolis, Indiana, its mayor, and several city-owned utilities and their employees, alleging employment discrimination, various civil rights violations, and assorted claims under Indiana law. The district court dismissed the City and the mayor, and later granted the remaining defendants' summary-judgment motion in its entirety. We address in this order the merits of each of Stone's claims on appeal, and, in a separate published opinion issued today, we clarify the proper standard for summary judgment on retaliatory-discharge claims.

Stone, an African American who was then 47 years old, was hired as a service mechanic by defendant Citizens Mechanical Services, LLC ("CMS")[1] in September 1996. During his tenure Stone was employed solely by CMS and not any affiliate or parent company. After applying for the position, Stone received a copy of the governing collective bargaining agreement ("CBA") which provides that all new employees are probationary during their first year, and can be discharged with or without cause during that period.

---

[1] CMS, commonly known as the Service and Rental Center, is a subsidiary of Citizens By-Products Coal Company, which in turn is a subsidiary of Citizens Gas & Coke Utility. Citizens Gas itself is a d/b/a of the City of Indianapolis Public Utilities Division. Stone named each company as a defendant.

As a service mechanic Stone was responsible for installing and maintaining water heaters and boilers, and installing gas lines. After about six months Stone began accumulating reprimands from supervisor David Martin for job lapses, including miscalculating customer bills, neglecting to timely report vandalism to his company vehicle, failing to complete jobs in a timely or accurate manner, and leaving job-related paperwork undone.

Meanwhile, within two days of starting work as a service mechanic, Stone began applying for other positions within CMS and Citizens Gas. Stone first applied to CMS for a Field Sales Representative position. He was not interviewed, and was later informed that CMS had decided not to fill the position. In December 1996 Stone applied to become a residential sales representative with Citizens Gas. This position required a four-year college degree, preferably in marketing or business administration, and experience in developing marketing and sales programs. Citizens Gas concluded that Stone lacked the requisite education and experience and thus did not interview him. In January 1997 Stone informed CMS's president that the company was violating Indiana law by performing plumbing work without proper licensing or a "contractor of record" to supervise. The union, at the company's urging, directed the four service mechanics (including Stone) to vote one of themselves as "contractor of record." This title carried with it an extra $1.50 per hour in salary. The mechanics *unanimously* selected Daniel Canter, the most senior of the four, to serve in this role. Finally, in June 1997 Stone vied to become CMS's general manager, even though he lacked the required bachelor's degree in accounting, finance, or business. Stone was not interviewed for this position.

Stone also reportedly sustained a number of injuries during his time at CMS. Several times he missed work due to what he characterized as work-related back problems, but in each instance doctors at CMS's medical provider, St. Vincent Hospital, examined Stone and determined that his back pain was neither work-related nor severe enough to require absence from work. Stone was, however, awarded workers' compensation for some of these injury claims. After one injury in August 1997, Stone disputed the doctor's evaluation and refused to sign the form authorizing his return to work. For several days Stone performed light-duty work, until another doctor concluded during a follow-up appointment that Stone could work without limitations. Upon returning to his regular duties, Stone told his supervisors that he was going to file a workers' compensation claim. On August 24, 1997, Stone submitted a memorandum requesting leave under the Family and Medical Leave Act (FMLA) but did not specify the basis for his leave.

Two days after receiving the FMLA request, CMS announced that it was firing Stone for poor performance. Because Stone had been at CMS for less than a year and was still a probationary employee, CMS was at liberty under the CBA to terminate his employment either with or without cause. Stone, however, had previously filed charges of discrimination with the Indiana Civil Rights Commission and the EEOC in March 1997. One charge, against Citizens Gas, alleged sex, race and age discrimination resulting from Citizens Gas' failure to hire him. The second charge, against CMS, alleged that he was not selected for the positions of Field Sales Representative and "contractor of record" due to his race. Then, in August 1997, Stone filed a third charge against CMS, now claiming that he was fired in retaliation for

filing his prior charges and in violation of the Americans with Disabilities Act ("ADA"). After receiving right-to-sue letters from the EEOC, Stone filed two complaints in the Southern District of Indiana, the one giving rise to this appeal in 1998 and the second in 1999. Both cases, which were assigned to different judges, raise overlapping claims centered on Stone's lack of success in changing jobs within the Citizens Gas family of companies and, ultimately, his termination from CMS. The second case reached the summary judgment stage first, and we affirmed the ruling for the defendants more than a year ago. *See Stone v. City of Indianapolis,* 2000 U.S. App. LEXIS 27447, No. 00-2356, 2000 WL 1597785 (7th Cir. Oct. 23, 2000) (unpublished). Five months later, the district court finally entered summary judgment against Stone in the earlier action.

Stone attributes his failure to secure a different job and his firing to race and age discrimination. The district court, however, held that Stone had failed to present a prima facie case of discrimination and, in any event, could not demonstrate pretext in the reasons given for the defendants' employment actions. We agree. The district court exhaustively analyzed Stone's claims under the Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 621 *et seq.*; Title VII of the Civil Rights Act of 1964 (Title VII), 42 U.S.C. § 2000e *et seq.*; and 42 U.S.C. § 1981 and concluded that Stone had no evidence to dispute CMS's explanation that he was fired because of his "inability to adequately perform the duties and responsibilities of the service mechanic position." The district court further held that even if Stone could satisfy his prima facie burden, he failed to show on the same facts that the defendants' legitimate, non-discriminatory reasons for firing him and not hiring him for

other positions were a pretext for age or race discrimination. *See Fortier v. Ameritech Mobile Communications, Inc.*, 161 F.3d 1106, 1113 (7th Cir. 1998) (noting overlap between factual inquiry relevant to "legitimate expectations" prong of the prima facie case and proof of pretext).

To show pretext, Stone must demonstrate that the defendants' proffered reasons were lies or completely lacking in factual basis. *Jordan v. Summers*, 205 F.3d 337, 343 (7th Cir. 2000). In the termination context this means that even if the reasons CMS gave for firing Stone were mistaken, ill considered or foolish, Stone cannot demonstrate pretext so long as CMS honestly believed those reasons. *Id.* CMS fired Stone for poor work performance, his failure to timely and properly complete work assignments, and his bad attitude. Stone has not proffered any evidence indicating that this explanation was pretextual or unworthy of credence. *See Kaniff v. Allstate Ins. Co.*, 121 F.3d 258, 263 (7th Cir. 1997).

In the failure-to-hire context, a desire to hire the more experienced or better qualified applicant is a non-discriminatory, legitimate, and common reason on which to base a hiring decision. *See, e.g., Gorence v. Eagle Food Centers, Inc.*, 242 F.3d 759, 766 (7th Cir. 2001); *Mills v. Health Care Serv. Corp.*, 171 F.3d 450, 458-59 (7th Cir. 1999); *see also Vitug v. Multistate Tax Comm'n*, 88 F.3d 506, 515-16 (7th Cir. 1996). CMS and Citizens Gas explained that their decisions not to hire Stone for the various positions were based on his lack of necessary experience and educational qualifications, and on the availability of other, more-qualified candidates. Stone failed to demonstrate a

triable issue of fact concerning these explanations.[2]

Stone also claimed that his firing was retaliatory; he argues that the district court mischaracterized his complaint by casting its retaliation claim as one arising from the EEOC charges instead of his real allegation that the defendants retaliated against him because he announced his plan to file a workers' compensation claim for his back injury and also requested leave under the FMLA. After reviewing the complaint we agree with Stone insofar as he contends that he alleged retaliation arising from his announced intention to pursue a workers' compensation claim.[3] We think it is doubtful, however, that Stone properly raised in the district

---

[2] Stone contends that in evaluating his discrimination claims the district court erred in refusing to give conclusive effect to the finding of his state unemployment compensation proceeding that he was discharged by CMS without cause. Stone raised an identical argument in his previous appeal, *see Stone*, 2000 U.S. App. LEXIS 27447, 2000 WL 1597785, at *5, which we rejected and will not address anew here.

[3] The defendants assert for the first time in their brief that Stone's retaliation claims are barred by res judicata because they were rejected in Stone's earlier appeal. The defendants did not raise the point below, so it is waived. Moreover, we do not understand how two, nearly identical suits proceeded along on parallel tracks without consolidation, or why the defendants, represented by the same counsel in both cases, never raised a preclusion defense in the district court during the five months between our October 2000 order in Stone's first appeal, and the district court's March 2001 order in the present case.

court a retaliation claim based on his request for FMLA leave. As the defendants note, Stone failed to mention the FMLA in his original or amended complaints, and so the district court properly declined to address the issue on summary judgment. *Vidimos v. Laser Lab Ltd.* 99 F.3d 217, 222 (7th Cir. 1996); *Evans v. Fluor Distrib. Cos.*, 799 F.2d 364, 367 (7th Cir. 1986). And of course Stone cannot raise for the first time on appeal a claim that was not properly raised below. *Moulton v. Vigo County*, 150 F.3d 801, 803 (7th Cir. 1998).

Regardless, even if Stone did properly present the district court with both of his retaliation claims, the answer to each is the same: Stone offered no direct evidence of retaliation and did not satisfy his prima facie burden under the *McDonnell-Douglas* framework. As for direct evidence, Stone relied exclusively on the fact that he was fired just two days after requesting FMLA leave and a few weeks after submitting a workers' compensation claim. But mere temporal proximity is rarely sufficient to establish the causal link required for direct evidence of retaliation, *see Stone v. City of Indianapolis,* 2002 U.S. App. LEXIS 2523, No. 01-3210, slip op. at 5 (7th Cir. 2002), and it is specifically insufficient in this case. Moreover, to survive summary judgment under the *McDonnell-Douglas* framework Stone bore the burden at all times of showing that he was performing his job satisfactorily and after lodging a complaint about discrimination, only he, and not any other similarly situated employee who did not complain, was subjected to an adverse employment action. Stone failed to establish a prima facie case of retaliation because there he failed to offer any evidence that he was meeting CMS's legitimate job expectations. Thus summary judgment on the retaliatory discharge claims was proper.

Stone also included within his complaint a claim under 42 U.S.C. § 1983 that the defendants, by not promoting him to "contractor of record," deprived him of a property interest in his plumber's license and the extra pay to which he was entitled in that position. His argument that this claim should have survived summary judgment is frivolous. Whatever property interest Stone has in his plumber's license was not abrogated by CMS's decision not to promote him and ultimately to fire him. He still had his license; he simply could not use it as an employee of CMS. Nor can he claim that he held a property interest in the extra salary arising from the role of "contractor of record." He and three other mechanics unanimously decided to give the position to the most senior mechanic on the staff. Stone did not have a property interest in that position, and CMS did not violate his constitutional rights when he and his coworkers voted someone else into the job.

Finally, Stone claims that the district court erred in awarding costs to the defendants. Specifically, Stone objects to the assessment of deposition costs incurred after the close of discovery. We review for an abuse of discretion a claim that the district court erred in assessing costs against a party pursuant to Federal Rule of Civil Procedure 54. Under that rule "costs other than attorneys' fees shall be allowed as of course to the prevailing party unless the court otherwise directs." *See* Fed. R. Civ. P. 54(d)(1). The defendants are the "prevailing party" because the district court granted summary judgment in their favor on all counts. *Weeks v. Samsung Heavy Indus. Co., Ltd.*, 126 F.3d 926, 944 (7th Cir. 1997). Rule 54(d) creates a strong presumption that the prevailing party will recover costs, but leaves the ultimate decision to the district court's discretion. *Weeks*, 126 F.3d at 945; *Finchum*

v. Ford Motor Co., 57 F.3d 526, 533 (7th Cir. 1995). As long as there is statutory authority for allowing a particular item to be taxed as a cost, we will not overturn a district court's decision that the cost was necessary absent a showing of clear abuse of discretion. *Northbrook Excess & Surplus Ins. Co. v. Procter & Gamble Co.*, 924 F.2d 633, 642 (7th Cir. 1991). The presumption in favor of awarding costs to the prevailing party is difficult to overcome, and the district court must award costs unless it states good reasons for denying them. *See Congregation of the Passion, Holy Cross Province v. Touche, Ross & Co.*, 854 F.2d 219, 221-22 (7th Cir. 1988). The district court was statutorily authorized to award the challenged costs in this case, *see* 28 U.S.C. § 1920(2); *Weeks, 126 F.3d at 945* (deposition costs and transcripts are authorized costs under § 1920(2)), and we conclude that the district court did not abuse its discretion in awarding them.

AFFIRMED.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 01-3210

[Filed February 19, 2002]

ALFRED L. STONE,
Plaintiff-Appellant,

v.

CITY OF INDIANAPOLIS
PUBLIC UTILITIES DIVISION,
d/b/a CITIZENS GAS & COKE
UTILITY, et al.,
Defendants-Appellees.

Appeal from the United States District Court
for the Southern District of Indiana,
Indianapolis Division
No. 98 C 190
David F. Hamilton, Judge

JUDGES:
Before Posner, Manion, and Rovner, Circuit Judges.

OPINION

Posner, *Circuit Judge*. The plaintiff in this employment discrimination suit appeals from the grant of summary judgment for the defendants. As explained in an unpublished order issued today, none of the plaintiff's claims has any merit, and summary judgment was therefore properly granted. We limit this published opinion to a question on which clarification is needed. It is the proper standard for summary judgment when a plaintiff claims that he was retaliated against for complaining about employment discrimination. Two formulations are found in our cases, both adaptations of the ubiquitous *McDonnell Douglas* test for summary judgment in discrimination cases. *See McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 36 L. Ed. 2d 668, 93 S. Ct. 1817 (1973). One is that the plaintiff is entitled to summary judgment if he shows that (1) after lodging a complaint about discrimination, (2) only he, and not any otherwise similarly situated employee who did not complain, was (3) subjected to an adverse employment action even though (4) he was performing his job in a satisfactory manner; unless (5) the defendant presents evidence of a reason (good or bad, provided only that it is not one that the law forbids) for the adverse action. *Hiatt v. Rockwell Int'l Corp.*, 26 F.3d 761, 767-68 (7th Cir. 1994); *McEwen v. Delta Air Lines, Inc.*, 919 F.2d 58, 59 (7th Cir. 1990). The other formulation of the prima facie case of retaliation requires, in addition, (6) proof of a "causal link" between the protected expression in which the plaintiff engaged (as by filing a complaint about an unlawful act by his employer) and the adverse employment action of which he is complaining. E.g., *Miller v. American Family Mutual Ins. Co.*, 203 F.3d 997, 1007 (7th Cir. 2000); *Sauzek v. Exxon Coal USA, Inc.*, 202 F.3d 913, 918 (7th Cir. 2000); *Byers v. Dallas Morning*

News, Inc., 209 F.3d 419, 427 (5th Cir. 2000); *Jones v. Washington Metropolitan Area Transit Authority*, 340 U.S. App. D.C. 320, 205 F.3d 428, 433 (D.C. Cir. 2000).

Cases that employ the second formula go on to say that after the plaintiff has made his prima facie case, the defendant can defeat it by producing evidence that the motive for firing or taking other adverse employment action against the plaintiff was not retaliatory, unless the plaintiff is able to come back and show that the alleged nonretaliatory motive was actually pretextual. That is *McDonnell Douglas*-speak, all right, but it is out of place. If the plaintiff has produced evidence that he was fired because of his protected expression, he has gone beyond *McDonnell Douglas* by producing actual evidence of unlawful conduct-- evidence that the firing was in fact retaliation for his complaining about discrimination. The fact that the defendant may be able to produce evidence that the plaintiff was fired for a lawful reason just creates an issue of fact: what was the true cause of the discharge? Evidence, though not conclusive, that the cause was retaliation should be enough to entitle the plaintiff to a jury trial unless the defendant can produce uncontradicted evidence that he would have fired the plaintiff anyway, in which event the defendant's retaliatory motive, even if unchallenged, was not a but-for cause of the plaintiff's harm. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 244-45, 104 L. Ed. 2d 268, 109 S. Ct. 1775 (1989); *Miller v. Illinois Dept. of Corrections*, 107 F.3d 483, 484 (7th Cir. 1997); *Visser v. Packer Engineering Associates, Inc.*, 924 F.2d 655, 658 (7th Cir. 1991) (en banc); *Brown v. East Mississippi Electric Power Ass'n*, 989 F.2d 858, 862 (5th Cir. 1993).

McDonnell Douglas is designed to give the plaintiff a boost when he has no actual evidence of discrimination (or retaliation) but just some suspicious circumstances. If he can prove that his protected expression caused him to be fired, he doesn't need *McDonnell Douglas* and it gives him nothing. But this may depend on the precise meaning of "causal link." Again we find divergent formulations in the cases. If it means, as we have been assuming thus far and as we have held in a number of cases, *Dunn v. Nordstrom, Inc.*, 260 F.3d 778, 784 (7th Cir. 2001); *Basith v. Cook County*, 241 F.3d 919, 933 (7th Cir. 2001); *Cullom v. Brown*, 209 F.3d 1035, 1040 (7th Cir. 2000); *King v. Preferred Technical Group*, 166 F.3d 887, 892 (7th Cir. 1999); *Johnson v. City of Fort Wayne*, 91 F.3d 922, 939 (7th Cir. 1996), and *Klein v. Trustees of Indiana University*, 766 F.2d 275, 280 (7th Cir. 1985), that the plaintiff must present evidence that had it not been for his protected expression he would not have been fired (or suffered whatever other adverse action of which he is complaining), then the situation is as we have described it and *McDonnell Douglas* has no proper role to play in a federal retaliation suit. But the Fifth and Eleventh Circuits have held that all that "causal link" signifies in this context is that the protected expression and the adverse action "were not wholly unrelated," so that something less than proof that the plaintiff wouldn't have suffered an adverse employment action had he not engaged in the protected expression--something less, that is, than proof of but-for causation--will suffice to complete the prima facie case. *Fierros v. Texas Dept. of Health*, 274 F.3d 187, 191 (5th Cir. 2001); *Pennington v. City of Huntsville*, 261 F.3d 1262, 1265-66 (11th Cir. 2001); *Bass v. Board of County Commissioners*, 256 F.3d 1095, 1119 (11th Cir. 2001); *Long v. Eastfield College*, 88 F.3d 300, 305 n. 4 (5th Cir. 1996); *Simmons v. Camden County*

Board of Education, 757 F.2d 1187, 1189 (11th Cir. 1985) (per curiam). Some of our cases repeat this definition. *See, e.g., Horwitz v. Board of Education*, 260 F.3d 602, 613 (7th Cir. 2001); *Sauzek v. Exxon Coal USA, Inc., supra*, 202 F.3d at 918; *Vanasco v. National-Louis University*, 137 F.3d 962, 969 (7th Cir. 1998); *Hunt-Golliday v. Metropolitan Water Reclamation District*, 104 F.3d 1004, 1014 (7th Cir. 1997). All our cases, however--and this is true of the Fifth and Eleventh Circuit cases as well--are ones in which the plaintiff was proceeding under *McDonnell Douglas,* and we have explained why we think that a plaintiff so proceeding need not show even an attenuated causal link.

The concept of "not wholly unrelated" is both obscure and, as we just suggested, superfluous. It should be jettisoned. The plaintiff in a retaliation case should have two (and only two) distinct routes to obtaining/preventing summary judgment. One, the more straightforward, the one that is unrelated to *McDonnell Douglas,* is to present direct evidence (evidence that establishes without resort to inferences from circumstantial evidence) that he engaged in protected activity (filing a charge of discrimination) and as a result suffered the adverse employment action of which he complains. If the evidence is uncontradicted, the plaintiff is entitled to summary judgment. If it is contradicted, the case must be tried unless the defendant presents unrebutted evidence that he would have taken the adverse employment action against the plaintiff even if he had had no retaliatory motive; in that event the defendant is entitled to summary judgment because he has shown that the plaintiff wasn't harmed by retaliation.

The question of how much evidence the plaintiff must present to establish a triable issue that the adverse

employment action of which he complains was retaliatory is not susceptible of a general answer. But we remind that mere temporal proximity between the filing of the charge of discrimination and the action alleged to have been taken in retaliation for that filing will rarely be sufficient in and of itself to create a triable issue. *See Bilow v. Much Shelist Freed Denenberg Ament & Rubenstein, P.C.*, 2001 WL 1381076, at *9 (7th Cir. Nov. 7, 2001) ; *Pugh v. City of Attica*, 259 F.3d 619, 630 (7th Cir. 2001); *Contreras v. Suncast Corp.*, 237 F.3d 756, 765 (7th Cir. 2001); *Sauzek v. Exxon Coal USA, Inc., supra*, 202 F.3d at 918; *Gleason v. Mesirow Financial, Inc.*, 118 F.3d 1134, 1136, 1147 (7th Cir. 1997); but cf. *Lalvani v. Cook County*, 269 F.3d 785, 790 (7th Cir. 2001); *Hoffman-Dombrowski v. Arlington Int'l Racecourse, Inc.*, 254 F.3d 644, 653-54 (7th Cir. 2001). This is the rule in other circuits as well, *see Cardenas v. Massey*, 269 F.3d 251, 264 (3d Cir. 2001); *Little v. BP Exploration & Oil Co.*, 265 F.3d 357, 363-64 (6th Cir. 2001); *Bradley v. Widnall*, 232 F.3d 626, 633 (8th Cir. 2000), though not uniformly. *See Lovejoy-Wilson v. Noco Motor Fuel, Inc.*, 263 F.3d 208, 224 (2d Cir. 2001); *Bass v. Board of County Commissioners, supra*, 256 F.3d at 1119; *Dowe v. Total Action Against Poverty*, 145 F.3d 653, 657 (4th Cir. 1998).

The second route to summary judgment, the adaptation of McDonnell Douglas to the retaliation context, requires the plaintiff to show that after filing the charge only he, and not any similarly situated employee who did not file a charge, was subjected to an adverse employment action even though he was performing his job in a satisfactory manner. If the defendant presents no evidence in response, the plaintiff is entitled to summary judgment. If the defendant presents unrebutted evidence of a noninvidious reason for the adverse

action, he is entitled to summary judgment. Otherwise there must be a trial.

Because this opinion creates a new rule for the adjudication of retaliation cases, it has been circulated to the full court in advance of publication under 7th Cir. R. 40(e). No judge in regular active service voted to hear the case en banc.

A true Copy:

Teste:

_____

Clerk of the United States
Court of Appeals for the
Seventh Circuit

APPENDIX D

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

Cause No. IP 98-190-C H/G

[Filed March 30, 2001]

ALFRED L. STONE,	)
Plaintiff,	)
	)
v.	)
	)
CITY OF INDIANAPOLIS	)
PUBLIC UTILITIES DIVISION,	)
d/b/a CITIZENS GAS & COKE	)
UTILITY, et al.,	)
Defendants.	)
	)

ENTRY ON PENDING MOTIONS

I. *Background*

Plaintiff Alfred L. Stone, an African American, asserts in his amended complaint that the defendants discriminated against him in violation of federal law and also mistreated him in a manner actionable under Indiana law. His claims are asserted in his first amended complaint, filed on August 3, 1998.

District Court Entry on
Pending Motions - 3/30/01

The defendants are (1) the City of Indianapolis Public Utilities Division, d/b/a Citizens Gas & Coke Utility, (2) Citizens By-Products Coal Co., (3) Citizens Energy Services Corp., Service & Rental Center, LLC., (4) "Unknown Defendants," (5) Steven W. Stark, (6) Tom Darrow, Sr., (7) Sheldon Goldstein, (8) Dave Martin, (9) Dennis Rosier, and (10) Vickie Barlow. The court's Entry of April 5, 1999, dismissed claims against the City of Indianapolis, against then-Mayor Goldsmith, and against the "unknown defendants." Stone's request to reassert claims against the City and its current Mayor through the filing of a second amended complaint is discussed in Part II-B of this Entry.

Stone's claims in this action arise out of his employment and the termination of his employment by Service & Rental Center, LLC, which is a subsidiary of Citizens By-Products Coal Company, which in turn is a subsidiary of Citizens Gas & Coke Utility. Stone's claims, as presented in the first amended complaint, are the following:

Count I	Violation of 42 U.S.C. § 1981
Count II	Violation of Title VII of the Civil Rights Act of 1964
Count III	Violation of Constitutional Rights (42 U.S.C. § 1983)
Count IV	Violation of Statutory Rights
Count V	Violation of Constitutional Rights
Count VI	Conspiracy to Violate Civil Rights
Count VII	Intentional Infliction of Emotional Distress
Count VIII	Intentional Infliction of Emotional Distress

Count IX	Respondeat Superior Liability
Count X	Respondeat Superior Liability
Count XI	Negligence
Count XII	Negligence
Count XIII	Negligence
Count XIV	Retaliatory Discharge
Count XV	Denial of Medical Treatment
Count XVI	Title VII of the Civil Rights Act of 1964
Count XVII	Age Discrimination

As used in this Entry, "City" refers to the City of Indianapolis, "Citizens Gas" refers to Citizens Gas & Coke Utility, "SRC" refers to Service & Rental Center, LLC, and "City defendants" refers to the City and to putative defendant Mayor Peterson.

With respect to the federal statutory claims in particular, the following sequence and activities are noted:

- Stone filed a charge of discrimination with the Indiana Civil Rights Commission and the EEOC on March 14, 1997. This charge was filed against Citizens Gas and is identified as No. 240971240. Stone alleges that he was not selected for the buyer position due to his sex and age and was not considered for an interview for the residential sales representative position due to his race and age. A right-to-sue notice was issued in No. 240971240 on April 30, 1998.

- Stone filed a second charge of discrimination with the Indiana Civil Rights Commission and the EEOC on March 14, 1997. This charge was filed against SRC and is identified as No. 240971235. Stone alleges that he was not

selected for the position of Field Sales Representative due to his race. This charge of discrimination was amended on April 17, 1997, with the allegation that Stone was not selected to be the contractor of record in January 1997. A right-to-sue notice was issued in No. 240971235 on March 27, 1998.

- Stone filed a charge of discrimination with the Indiana Civil Rights Commission and the EEOC on August 28, 1997. This charge was filed against SRC and is identified as No. 240972811. Stone alleges that he was discharged from employment with SRC in retaliation for filing the prior EEOC charge in No. 240971235 and because SRC regarded Stone as a person with a disability.

This court has jurisdiction over both the subject matter of the action and the parties to the action. It has jurisdiction over the federal claims by virtue of 28 U.S.C. § 1331 (a), and jurisdiction over the pendent state law claims by virtue of 28 U.S.C. § 1367(a).

For the most part, the non-dispositive motions filed by the parties are addressed in Part II of this Entry and the dispositive motions are addressed in Part III. The summary of these rulings is set forth in Part IV.

II. *Non-Dispositive Motions*

A. *Motion for Leave to file Second Amended Complaint*

Stone has filed a motion for leave to file a second amended complaint for the purpose of expanding his claims

to include claims against the City and its present Mayor. The defendants' motion to strike the motion for leave to amend is denied.

In considering whether to allow a plaintiff to amend or supplement its complaint, the district court should consider the following factors: (1) undue delay in filing the motion; (2) lack of notice to adverse parties; (3) whether the movant is acting in bad faith, or with a dilatory motive; (4) failure to cure deficiencies by previous amendments; (5) the possibility of undue prejudice to adverse parties; and (6) whether the amendment is futile. *Foman v. Davis,* 371 U.S. 178, 182, 83 S. Ct. 227, 230 (1962).

In *Sanders v. Venture Stores, Inc.,* 56 F.3d 771 (7th Cir. 1995), the court cited a number of its published decisions which had affirmed the denial of a motion to amend after the filing, briefing or decision of a motion for summary judgment. The principal basis of the court's decisions in these cases was the unwarranted delay and burden an amended complaint would bring to the litigation. That principle is fully applicable here, where the additional amendment sought to the amended complaint could have been sought nearly a year before it was. Stone's requested expansion of the action could have followed quickly on the heels of the Entry of April 5, 1999, instead of nearly a year later and nearly four months after the defendants' motion for summary judgment had been filed.

An alternative, and more substantive, basis for denying Stone's motion for leave to further amend his amended complaint is that the proposed claims against the

City and Mayor Peterson are meritless, so the amendment would be futile even if it were timely. This is demonstrated by the discussion of the defendants' motion for summary judgment in Part III-B of this Entry and by the fact that the proposed claims against the City and Mayor Peterson derive entirely from the underlying claim of wrongful termination and other mistreatment of Stone while employed by SRC. The court need not and will not permit a futile amendment. *Duda v. Board of Education of Franklin Park Public School Dist. No. 84,* 133 F.3d 1054, 1057 n.4 (7th Cir. 1998); *Moore v. State of Indiana,* 999 F.2d 1125 (7th Cir. 1993); *Williams v. United States Postal Service,* 873 F.2d 1069, 1072 (7th Cir. 1989) (while leave to amend shall be freely granted where warranted, "this principle is inapplicable where the amendment would prove futile"); *see also Perkins v. Silverstein,* 939 F.2d 463,472 (7th Cir. 1991) ("To hold otherwise would impose upon the defendants and the courts the arduous task of responding to an obviously futile gesture on the part of the plaintiffs.").

Based on the foregoing, therefore, the plaintiff's motion for leave to amend the complaint for a second time to join Mayor Bart Peterson and the City of Indianapolis is denied. The summons issued on March 10, 2000, to those putative defendants is quashed.

B. *Motion In Limine*

Stone's motion *in limine* is denied as moot in light of the disposition of the defendants' motion for summary judgment as described in Part III-B of this Entry.

C. *Motion to Withdraw Appearance*

The motion of attorney Dale R. Simmons to withdraw his appearance on behalf of the City and former defendant Mayor Goldsmith is granted.

D. *Motion to Strike Surreply*

The defendants' motion to strike Stone's surreply to the defendants' motion for summary judgment is denied, though only arguments and materials properly presented in or through such surreply will be considered.

E. *Motion to Strike Affidavit*

Stone has moved to strike Sheldon Goldstein's second affidavit on the ground that it was "presented in bad faith." Rule 56 of the *Federal Rules of Civil Procedure* provides:

> (g) Affidavits Made in Bad Faith. Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused the other party to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.

Stone supports his assertion of bad faith by suggesting that certain statements in Goldstein's second affidavit are untrue and that certain statements in Goldstein's second affidavit contradict the information supplied in the answers to interrogatories sworn to by F. Ronald Walker.

The court finds no contradiction. The interrogatory response, to Interrogatory No. 3, list Matthew Fisse as a service mechanic employed by SRC. That response does not describe Fisse as a licensed plumber, and nothing in the evidentiary material or legal arguments presented to the court in this case shows that each service mechanic was required to be a licensed plumber. The second affidavit of Sheldon Goldstein states that Fisse was interviewed and hired to fill the position of Helper and that:

> 4. Fisse is not a licensed journeyman plumber.
>
> 5. At no time was Fisse authorized by SRC to perform plumbing work-work exclusively reserved for journeyman plumbers.

Without contradiction in the materials the defendants have presented, the court finds no "bad faith" in the second affidavit of Sheldon Goldstein. Stone does not believe Goldstein's statements are true, but his disagreement with them would not support striking the second affidavit or otherwise sanctioning the defendants. Accordingly, Stone's motion to strike Sheldon Goldstein's second affidavit is denied.

District Court Entry on
Pending Motions - 3/30/01

III. *Dispositive Motions*

A. *Motion to Dismiss Counts XVI and XVII of the Amended Complaint*

The defendants have filed a motion to dismiss Counts XVI and XVII of the amended complaint. The plaintiff has opposed this motion and seeks sanctions against Citizens Gas for its motion.

In Counts XVI and XVII of the amended complaint, the plaintiff asserts claims for discrimination, invoking the remedial provisions of Title VII of the Civil Rights Act of 1964 and the Age Discrimination in Employment Act.

It is well established that a Title VII plaintiff must file his suit within 90 days of her receipt of the right-to-sue notice from the EEOC. *Houston v. Sidley & Austin,* 185 F.3d 837, 839 (7th Cir. 1999). The 90 days begin to run upon plaintiff's "actual receipt" of the notice. *Id.* This is a requirement in Title VII cases imposed by 42 U.S.C. § 2000e-5(e)(1), and is required in age discrimination cases by 29 U.S.C. § 626(e).

The defendants reasor that the amended complaint (filed by counsel representing Stone at the time) was not timely filed as to Counts XVI and XVII because Stone had 90 days after receipt of the right to sue notice in which to file suit and did not do so. The right to sue notice in No. 240971240 was issued on April 30, 1998. The amended complaint was filed 95 days later, on August 3, 1998. Neither side has offered proof as to when plaintiff actually received the right to sue notice. Accordingly, the court is unable to calculate the

commencement of the 90-day period. The defendants' motion to dismiss is denied. The plaintiff's request for sanctions against Citizens Gas for the filing of such motion is also denied.

B. *Motion for Summary Judgment*

The defendants seek resolution of each of the claims through the entry of summary judgment. Summary judgment is proper only "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). A "material fact" is one that "might affect the outcome of the suit." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A dispute is genuine only if a reasonable jury could find for the non-moving party. *Id.*

The purpose of summary judgment is to "pierce the pleadings and to assess the proof in order to see whether there is a genuine need for trial." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). Summary judgment is not a disfavored procedural shortcut; rather, it is an integral part of the federal rules, which are designed to secure the just and expeditious determination of every action. *United Ass 'n of Black Landscapers v. City of Milwaukee,* 916 F.2d 1261, 1267-68 (7th Cir. 1990), *cert. denied,* 111 S. Ct. 1317 (199t).

Because the defendants seek the entry of summary judgment and because Stone is now proceeding without

counsel, the notice required by *Lewis v. Faulkner,* 689 F.2d 100 (7th Cir. 1989), was issued. Through this notice, Stone was notified of the nature of the defendants' motion, of the proper manner in which to respond, and of the consequences of failing to respond.

In order for a party "to avoid summary judgment that party must supply evidence sufficient to allow a jury to render a verdict in his favor." *Williams v. Ramos,* 71 F.3d 1246, 1248 (7th Cir. 1995). The opposing party must "go beyond the pleadings" and set forth specific facts to show that a genuine issue exists. See *Hong v. Children's Mem. Hosp.,* 993 F.2d 1257, 1261 (7th Cir. 1993), *cert. denied,* 511 U.S. 1005 (1994). "Summary judgment is appropriate - in fact, is mandated where there are no disputed issues of material fact and the movant must prevail as a matter of law." *Dempsey v. Atchison, Topeka and Santa Fe Ry. Co.,* 16 F.3d 832, 836 (7th Cir. 1994).

The facts set forth in this entry are either undisputed or reflect the evidence (though not mere allegations or assertions in briefs) in the light reasonably most favorable to plaintiff Stone. Stone is African-American and was born on August 7, 1950. Stone has worked as a plumber throughout his adult life from time to time. In February 1993, the Indiana Plumbing Commission issued Stone a plumbing contractor's license.

In or about September 1996, Stone submitted an application to SRC for the position of service mechanic. He was hired by SRC to fill that position and his employment began on September 23, 1996. At the times pertinent to the

claims in this action, Stone was employed only by SRC, and not by any of its affiliates or parent companies.

On September 24, 1996, Stone completed an application for employment with SRC. Stone was provided a copy of the collective bargaining agreement between Citizens Gas and the International Brotherhood of Electrical Workers, Local 1400. This agreement also applied to SRC employees. Pursuant to the collective bargaining agreement, employees were deemed probationary employees for the first 12 months of their employment and could be discharged with or without cause during their probationary period. As a service mechanic Stone, among other things, installed, repaired, and serviced domestic/commercial appliances and equipment. From September 1996 through November 1996, SRC required Stone to train with leased employees from Citizens Gas.

While employed by SRC, Stone submitted applications for other positions with SRC and, in one case, with Citizens Gas.

- On September 26, 1996, Stone submitted a letter of interest for the posted position of sales field representative at SRC. Stone was not interviewed for the position, and in October 1996, was informed by Cheryl Smith, employment administrator for Citizens Gas, that SRC decided not to fill the position.

- On December 17, 1996, Stone submitted a cover letter and resume for the posted position of residential sales representative with Citizens

Gas. The posted position required the applicant to possess a four year college degree, preferably in Business Administration and/or Marketing, and to be experienced in the development of marketing and sales promotion programs. After a review of Stone's resume, it was determined that Stone did not possess the required educational and sales experience. Stone was informed that he had not been selected to be interviewed for the position. In the summer of 1997, Jason Turtle and Frank Neal were hired for the position of residential sales representative. Tuttle and Neal possessed the required skills and experience in sales and marketing.

- In or about June 1997, Stone applied for the position of SRC General Manager, though he did not have a bachelor's degree in accounting, finance, or business. SRC informed Stone that he would not be interviewed because he did not possess the required experience, education, and skills.

The undisputed facts show the following documented deficiencies in Stone's performance as a service mechanic for SRC.

- On May 30,1997, Martin, Stone's supervisor at SRC, spoke with Stone concerning why Stone and Wes Phelan charged a customer a one-person labor rate to replace a residential

water heater when the customer had been informed that he would be charged a two-person labor rate. Martin also inquired why Stone and Phelan took one hour to drive to the customer's residence and one hour and 45 minutes to return to SRC. Martin counseled Stone that SRC and its employees, including Stone, could not operate in that manner.

- On May 23, 1997, Stone contacted the Indianapolis Police Department to report that his company vehicle had been vandalized. Stone informed the police department that nothing appeared to be missing from the vehicle. Nearly 18 days after Stone had reported the vandalism and eight days after he had completed an inventory of company equipment assigned to him, Stone completed a "Property Damage Report" to inform Citizens Gas that a cordless power drill and gas control valves were missing from his company vehicle.

- In June 1997, Leah McMahon, an African-American Office Manager for SRC, returned a job contract to Martin and informed him that Stone had inaccurately calculated a customer's bill.

- In June 1997, Martin counseled Stone on the fact that he had improperly completed his records and had inaccurately calculated a

customer's bill. After Martin returned the form to Stone, Stone approached McMahon and forcefully slammed thirty-five cents down on her desk.

- Both Martin and McMahon refused to accept Stone's money because McMahon had already reconciled the error on SRC's books. With respect to the thirty-five cent error just described, Stone states that McMahon and Martin verbally abused him when they asked him how he could make such a mistake.

- Stone states that McMahon and Martin also verbally abused Stone when they asked him if he knew what he was doing.

- Before leaving for the weekend of June 30, 1997, Stone left his pager, which needed replacement batteries, on the desk of Jeannine Adams, a dispatcher, rather than follow corporate procedure and notify Martin or another supervisor that he needed new batteries.

- On July 3, 1997, Stone was authorized to replace the shut-off valve from a gas stove at a customer's residence. Although a strong gas odor was present before Stone left the customer's residence, Stone did not investigate the odor, but assured the customer that the gas odor would evaporate. Later, the customer

contacted SRC to complain of a gas odor. Martin counseled Stone regarding Stone's failure to properly remove the old shut-off valve in order to prevent such gas leaks. Stone admits that he made a mistake which could have caused injury. Due to Stone's carelessness, SRC sent another service mechanic to make the necessary repairs.

- Between July 14 and July 21, 1997, Stone was instructed to repair several gas leaks and venting problems, yet Stone did not complete the jobs even after spending several hours at each worksite. On July 14, 1997, Martin noticed that Stone had written on his July 11 time sheet that he had jumped the flow switch on a boiler unit and had left it without repairing or replacing the flow switch. Martin asked Stone if he had repaired or replaced the flow switch after jumping it, and Stone stated that he did not replace the switch since it was not leaking. In a subsequent meeting, Martin informed Stone and his co-employees that flow switches are not to be jumped and then left.

- After having been expressly instructed in a memorandum dated July 18, 1997, that SRC employees were to complete order forms for all jobs, in July 1997, Stone did not complete any forms for a job where he could not gain entrance. Despite having been informed in June 1996, by memorandum, regarding the

proper forms to complete for such visits, on July 17, 1997, Stone submitted a memorandum to McMahon requesting information on why he had to complete an order form. On July 17, 1997, McMahon once again informed Stone that he was required to submit an order form for all jobs.

- On July 17, 1997, after learning that Stone had failed to use a U-Gauge when testing for gas leaks and repairing venting problems on July 11, 1997, Martin instructed Stone that he must always use a U-Gauge to run the three-minute test on the gas line.

- On July 23, 1997, Adams informed Martin that she had to page Stone at 10:30 a.m. because he did not call in after his first order, even though Stone had been instructed to call in after each order and for lunch breaks. Although Stone took his lunch break around 11:30 a.m., Stone did not voluntarily contact SRC until 2:09 p.m. after he had completed his fifth assigned job.

- On July 24, 1997, Stone and Ron Yates, a SRC service mechanic, left a customer's residence without informing the customer that they were leaving to go to Burger King to contact SRC to request a third person for the job.

- Prior to July 23, 1997, Martin had spoken with Stark and Thomas Derrow, SRC's Interim Manager, concerning Stone's performance deficiencies and his attitude and had provided them with copies of his reports on such deficiencies.

While employed by SRC, Stone reported and received attention for injuries which had some connection with or impact on his work:

- In or about October 1996, Stone informed the SRC dispatch operator that he had injured his knee when he slipped in a company truck. His acting supervisor, Martin, contacted Stone and instructed him to visit Victoria Barlow, an African-American Occupational Health and Wellness Nurse for SRC, for evaluation of his injury. Barlow evaluated Stone's injury. Stone states that he suffered a work related injury to his back on November 18, 1996, when he and three other employees were moving a commercial water heater. Stone reported that he felt pain in his back during the evening of November 18, 1996, and took Ibuprofen to relieve the pain. Although Stone was aware that he was in pain on November 18, he did not report the injury to SRC until November 25, 1996, after he had visited the emergency room at the Veterans Administration Hospital on November 22, 1996.

- A physician at the VA Hospital diagnosed Stone with an inflamed hemorrhoid and restricted Stone from doing much lifting or moving. In a letter dated November 25, 1996, which Stone placed on Martin's desk, Stone informed SRC that he had incurred a work related injury on November 18, 1996, and that he would be off work until November 29, 1996, pursuant to the VA Hospital's order. Although Stone was required to report any injuries sustained at work, no matter how minor, either to the nurse or to his supervisor, Stone did not report his injury to SRC until November 25, 1996, seven days after the injury on the 18th. Although SRC had the statutory right to send Stone to its doctor unless there was an emergency, Stone waited four days before he visited the VA Hospital on November 22, to seek treatment for the pain he had felt on November 18. After Stone reported the injury to SRC, SRC sent him to the St. Vincent Hospital department of occupational health for evaluation. On November 25, 1996, Dr. Brian Timura, a physician at St. Vincent Hospital, diagnosed Stone with a thrombosed external hemorrhoid and instructed Stone to rest. Dr. Timura concluded that Stone's medical condition was not work related. SRC followed the VA Hospital's recommendation that Stone remain off work until November 29, 1996. In December 1996, Stone returned to the VA

Hospital for follow-up evaluation and was informed that he would have to decide whether to have surgery to remove the hemorrhoid. Stone elected not to have surgery. Stone was to contact SRC after visiting the VA Hospital for his follow-up evaluation, but never did so. After reporting his injury, Stone filed a claim for workers' compensation, in which forum he prevailed.

- On or about July 24, 1997, Stone visited Barlow and reported that he had experienced pain in his back after trying to remove a coil from a boiler on July 23, 1997. Barlow provided Stone with anti-inflammatory medication and two ice packs and asked him if he wanted to visit St. Vincent Hospital, SRC's medical provider.

- Stone stated that he did not need to visit St. Vincent Hospital, but would request an appointment should the pain become worse. Barlow informed Martin that Stone was not to perform any job that required lifting.

- At no time between July 24, and August 4, 1997, did Stone return to Barlow's office complaining of pain in his back.

- On August 4, 1997, Stone produced to Barlow a picture of a seat, a Sacro-ease unit, that he wanted to place in his truck to absorb the

shock that he incurred when riding in his company vehicle.

- Stone also informed Barlow that he did not like to take medication for treatment of his back pain but preferred to use more natural remedies, such as massages and whirpools. To accommodate Stone's back pain, Barlow instructed Martin to purchase the Sacro-ease unit for Stone. Martin instructed Stone to visit his personal physician (the VA Hospital) for the sole purpose of purchasing the Sacro-ease unit. Neither Barlow nor Martin authorized Stone to visit the VA Hospital for evaluation or treatment of his back pain. Stone visited the VA Hospital for treatment of his back pain on August 4, 1997. On August 6, 1997, Stone delivered a note from the VA Hospital to SRC, stating only, without providing any medical reason, that Stone was not to return to work until August 8, 1997. Stone also produced a prescription from the VA Hospital for the Sacro-ease unit. After learning of Stone's visit to the VA Hospital, Barlow, on August 6, 1997, immediately made an appointment for Stone to visit St. Vincent Hospital for evaluation of his back pain.

- Dr. Moody, a physician at St. Vincent Hospital, examined Stone and authorized him to return to work with limitations on August 7, 1997. Stone rushed out of St. Vincent

Hospital, refusing to sign a form for his return to work, because he did not agree with Dr. Moody's medical evaluation of his condition or his recommendation that Stone could return to work with limitations on August 7. Stone also walked out before he had received the time of his August 13, 1997, appointment. Stone disputed Dr. Moody's diagnosis and recommendation because Stone believed that the VA Hospital had declared him "disabled" based on the fact that he had been authorized to remain off work until August 8, 1997.

- Based on St. Vincent Hospital's evaluation, Martin and Richard Archer, the Warehouse Supervisor, assigned Stone light duty work in the warehouse which included, among other things, counting and sorting parts.

- On August 7, 1997, Stone filed a memo with the Indiana Workers Compensation Board, requesting that Board resolve a dispute between Stone and SRC regarding the conflicting return to work dates prescribed by the VA Hospital and St. Vincent Hospital. On August 11, 1997, Martin informed Stone that Barlow had scheduled an appointment for him with Dr. Shay, a back specialist, for evaluation of his back pain on August 12. Stone informed Martin that he would not meet with Dr. Shay. Also on August 12, 1997, Stone canceled his appointment with Dr. Shay. Because Stone had

left Dr. Moody's office without receiving a time for his follow-up visit, Stone visited Barlow's office on August 13, 1997, in order for her to schedule an appointment time. Also on August 13, 1997, Stone informed Barlow that he completely disagreed with SRC's selection of the specialist. On August 13, 1997, Stone returned to St. Vincent Hospital for a follow-up evaluation of his back pain. Dr. Timura evaluated Stone's back and determined that he could return to work without limitations. Stone informed Dr. Timura that he had not taken the Ibuprofen or Flexeril which had been prescribed for his pain on August 6, 1997. On August 14, 1997, Stone returned to his regular duties as a service mechanic.

- On August 24, 1997, Stone submitted a memorandum entitled "Request for Leave Under Family and Medical Leave Act" to Robert Hummel, Vice President of Human Resources for Citizens Gas, requesting leave, which was to commence on October 1, 1997, though without expressly stating the basis for such leave.

Stone expressed to SRC management that SRC was not in compliance with Indiana law concerning the holding of a contractor's license. Specifically, in a meeting with SRC employees in January 1997, Stone informed Steven Stark, SRC President, that SRC was violating Indiana plumbing laws

because SRC was not properly licensed and did not have a contractor of record. Stone states that Stark verbally abused him in the January 1997 meeting when Stark stated to Stone that he felt like he was being talked down to. After the meeting, Stark instructed the Union to decide who would be the contractor of record. The Union decided that the four service mechanics would vote to decide who would be the contractor of record and that person would receive an additional $1.50 per hour stipend for this role. Stone and the other three service mechanics unanimously selected Daniel Canter because he had the most seniority. Several months later, in apparent response to friction between himself and others, on June 17, 1997, Stone hand-delivered to Stark a memo entitled "Defamation of Character by Leah McMahon and Dave Martin," accusing Martin and McMahon of defamation and threatening to "sue all concerned parties under Indiana law."

Stone's employment with SRC came to an end on August 26, 1997, about eleven months after it began. On August 25, 1997, Derrow, who had authority to hire and fire with SRC, had made the decision to terminate Stone's employment for his inability to perform adequately the duties and responsibilities of the SRC mechanic position to standards acceptable to SRC. On August 26, 1997, Derrow convened a meeting involving Chester Patton, a Union steward, Martin, Sheldon Goldstein, the manager of SRC who had replaced Derrow as interim manager, and Stone. In addition to producing a termination letter to Stone, Derrow informed Stone that he was being terminated for his failure to perform adequately to standards acceptable to SRC. Stone had been absent from work on August 25, 1997, in order to attend his

uncle's funeral. Stone does not contend that anyone at SRC told him that his employment was being terminated for failing or refusing to return to work.

After the meeting and termination, Stone requested the Union to file a grievance on his behalf to protest the termination as unjust. Stone never met with the Union's business manager concerning the status of the grievance because Stone's doctors' appointments continued to interfere with his scheduled meetings with the business manager. In September 1997, two hearing dates were scheduled in order for representatives from SRC and the Union to discuss Stone's grievance, but Stone did not attend either hearing.

In September 1997, Stone requested SRC to reopen his medical case because of persisting back pain. In response, Barlow made an appointment for Stone to go to St. Vincent's Hospital for a one-time evaluation of the area. On September 24, 1997, Stone returned to St. Vincent Hospital for a one-time evaluation by Dr. Tamara. Dr. Tamara once again determined that Stone could return to work without restrictions.

In other post-termination activity, Stone filed a complaint with the National Labor Relations Board, which was dismissed on the ground that insufficient evidence existed to establish Stone's claim. Stone also filed a complaint with the Indiana Attorney General against SRC. Stone filed a claim with the Department of Workforce Development for unemployment compensation. He prevailed on that claim.

Stone alleges that the defendants discriminated against him on the basis of his age and his race, and retaliated against him, and in doing so violated Title VII of the Civil Rights Act of 1964 and the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 621, *et seq.* He also presents the additional claims listed in Part I of this Entry. For purposes of clarity in analysis, his federal claims will be considered first.

1. *Title VII.* Title VII of the Civil Rights Act of 1964 makes it an unlawful employment practice to discriminate against an individual on the basis of race, color, religion, sex, or national origin. 42 U.S.C. § 2000e-2(a). Title VII also prohibits employers from discriminating against an employee "because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter." 42 U.S.C. § 2000e-3(a).

"A plaintiff may meet his burden of proof under Title VII by offering either direct proof of discriminatory intent or by proving disparate treatment through the indirect, burden-shifting method outlined by the Supreme Court in *McDonnell Douglas Corp. v. Green,* 411 U.S. 792 (1973)." *Contreras v. Suncast Corporation*, 237 F.3d 756, 759 (7th Cir. 2001).

Direct evidence is evidence which, if believed by the trier of fact, will prove the particular fact in question without reliance upon inference or presumption. *Plair v. E.J. Brach & Sons, Inc.,* 105 F.3d 343,347 (7tll Cir. 1997). The direct evidence must show that the defendant said or did something

indicating discriminatory animus with regard to the specific employment decision(s) in question. *Id.* Although Stone characterizes the evidence in this case as direct evidence of discrimination against him, it is not. He has not presented direct evidence of racial or other discriminatory animus, let alone connected that evidence to any decision in question. What Stone characterizes as direct evidence is instead his own interpretation of events and decisions. His claims therefore depend on the so-called indirect method of proof:

> Where a claimant offers no direct evidence, he or she may show discriminatory treatment under the *McDonnell Douglas* test. Under the *McDonnell Douglas* burden shifting method, the plaintiff must raise an inference of discrimination by offering sufficient evidence to make out the *prima facie* case. *Pafford v. Herman,* 148 F.3d 658,665 (7th Cir. 1998). To establish a *prima facie* case under *McDonnell Douglas,* the plaintiff must demonstrate that (1) he belongs to a protected class; (2) he performed his job satisfactorily; (3) he suffered an adverse employment action; and (4) his employer treated similarly situated employees outside of his protected class more favorably.

Contreras, 237 F.3d at 759. When the plaintiff claims discrimination in a failure to hire or failure to promote, the second element of the prima facie case is instead whether the plaintiff was qualified for the position in question.

> If a plaintiff is able to make the *prima facie* showing, there is a presumption that the plaintiff was discriminated against, and the employer must come forward with a legitimate non-discriminatory reason for the employment action. *See McDonnell Douglas,* 411 U.S. at 802. At this stage, the employer need not prove that it was actually motivated by the proffered reason. Rather, an employer "need only produce admissible evidence which would allow the trier of fact rationally to conclude that the employment decision had not been motivated by discriminatory animus." *Texas Dep't of Community Affairs v. Burdine,* 450 U.S. 248, 257 (1981). Once the defendant has met this burden of production, the plaintiff must prove by a preponderance of the evidence that the reason offered by the defendant is merely a pretext for discrimination. *Id.* at 253. While the *McDonnell Douglas* approach is often called a "burden shifting" method of proof, "[t]he ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff." *Id.*

Id. at 759-60. The presentation of a *prima facie* case is necessary in order for a claimant in Stone's position to survive summary judgment. *Bratton v. Roadway Package System, Inc.,* 77 F.3d 168, 175 (7th Cir. 1996); *Gilty v. Village of OakPark,* 919 F.2d 1247, 1250 (7th Cir. 1990).

Stone is a member of a protected class. His employment with SRC was terminated and SRC and Citizens Gas failed to promote/hire him on various occasions after his initial employment with SRC in September 1996. His showing that others, not members of his protected class, were treated more favorably, is meager, but the details of that need not be developed for the present. The defendants argue: (a) as to the termination of Stone's employment, Stone was not performing to SRC's satisfaction, (b) as to the failure to hire him for posted positions, Stone was not qualified or as qualified as the candidates selected, and (c) as to the claim of retaliation, there was no factual nexus between SRC's business decision (made in August 1997) and Stone's filing of charges with the EEOC (in March and April 1997).

Stone's response to all of these arguments is based only on his own self-assessment of both his capabilities and SRC's poor business practices, such as not having a contractor's license in its own name until Stone brought that requirement to the attention of SRC President Stark in January 1997. For purposes of the motion for summary judgment, the court assumes that Stone's assessment of his own performance of plumbing responsibilities was sufficient to raise a genuine issue of fact on the second element of his prima facie case regarding his termination claim. The Seventh Circuit has recognized that a plaintiff may create a material dispute about his own abilities by simply attesting that he was performing satisfactorily, though such assertions usually only shift the analysis to the pretext issue. *See Roberts v. Separators, Inc.*, 172 F.3d 448,451 (7th Cir. 1999) (assuming that plaintiff could establish this element and moving on to related pretext analysis) (citing *Gustovich v. AT & T Communications, Inc.*,

972 F.2d 845, 848 (7th Cir. 1992) (distinguishing between the use of such "self-serving" evidence at the *prima facie* case stage and at the pretext analysis).

With respect to the claimed failures to promote or to hire for other positions, Stone has failed to raise a genuine issue of material fact on the second element. The undisputed facts show that he did not have the required qualifications for those positions and that the persons selected were better qualified. The additional claim of non-selection of contractor of record in the amended charge in No. 240971235 is flatly refuted by the evidentiary record, which shows that Stone himself voted for the person who was selected.

Stone offers no direct evidence of retaliation in the termination of his employment on August 26, 1997. To establish a *prima facie* case of retaliation, Stone must show that (1) he engaged in statutorily protected expression, *i.e.*, reporting or otherwise opposing conduct prohibited by Title VII, (2) he suffered an adverse employment action, and (3) there is a causal link between his protected expression and the adverse employment action. *Pafford v. Herman,* 148 F.3d 658, 670 (7th Cir.), *cert. denied,* 119 S. Ct. 548 (1998). The first two elements are present here, though there is no evidence of the third, and no sufficient inference between the passage of time between Stone's filing of EEOC charges and his termination several months later. *Davidson v. Midelfort Clinic, Ltd.,* 133 F.3d 499, 511 (7th Cir. 1998) (in order to support an inference of retaliatory motive, the termination must have occurred "fairly soon after the employee's protected expression"); *Adusumilli v. City of Chicago,* 164 F.3d 353,363 (7th Cir. 1998) (eight month interval too long).

Assuming that Stone has shown a *prima facie* case with respect to his termination, or even for any additional decision at issue in his Title VII claim, the record here demonstrates that (1) the defendants had legitimate, non-discriminatory reasons for each of the employment decisions which affected Stone, these being, principally, that Stone was performing in a substandard and unsatisfactory fashion, and that employers filling skilled management positions are entitled to hire the most qualified applicant, *see Holder v. Old Ben Coal Co.*, 618 F.2d 1198, 1201-02 (7th Cir. 1980), and (2) Stone has not shown that those were a pretext for discrimination in any instance, meaning a lie. *Abioye v. Sundstrand Corp.*, 164 F.3d 364, 368 (7th Cir. 1998); *Fortier v. Ameritech Mobile Communications, Inc.*, 161 F.3d 1106, 1113 (7th Cir. 1998) (noting that the factual inquiry relevant to the issue of pretext often overlaps with the analysis of whether, for purposes of establishing the *prima facie* case, the employee was performing his job well enough to meet the employer's legitimate expectations at the time he was discharged).

The defendants are entitled to summary judgment as to Stone's claim under Title VII. *Jones v. Johnson,* 26 F.3d 727, 728 (7th Cir. 1994) ("Summary judgment is not a discretionary remedy. If the plaintiff lacks enough evidence, summary judgment must be granted."), *aff'd*, 115 S. Ct. 2151 (1995).

2. 42 U.S.C. 3 § 1981. Because Stone's Title VII claim of discrimination has fallen short, his claim pursuant to 42 U.S.C. § 1981 meets this same fate. *See Johnson v. City of Fort Wayne,* 91 F.3d 922, 940 (7th Cir. 1996) ("Although

section 1981 and Title VII differ in the types of discrimination they proscribe, the methods of proof and elements of the case are essentially identical.") (citing, *e.g., Von Zuckerstein v. Argonne Nat'l Lab.*, 984 F.2d 1467, 1472 (7th Cir. 1993)); *Rush v. McDonald's Corp.*, 966 F.2d 1104, 1119 (7th Cir. 1992) (a finding of lack of discriminatory animus on a Title VII claim will preclude recovery on a § 1981 claim).

3. 42 U.S.C. 3 § 1983. Stone asserts, in part, that he has a property interest in his plumber's license. He contends that he has been deprived of his property interest in his license. The undisputed facts here, however, do not suggest that SRC deprived Stone of the license or of the benefits flowing from it. He simply lost the benefits of that license vis-a-vis his probationary employment with SRC. This is not the deprivation of a constitutionally protected property interest. *Kevin v. Thompson,* 235 F.3d 1026 (7th Cir. 2000).

Stone also contends that he was entitled to extra pay for a period of time prior to January 1997. This claim lacks any merit. The extra pay was available for a designated contractor. Stone simply was not a designated contractor, either before or after January 1997. Whether SRC was required to have a contractor relationship at a time when it did not is not a material fact here, nor is the fact that Stone would have been qualified, by virtue of his plumber's license, to be a part of that relationship.

Stone also alleges that his right to equal protection of the laws was denied when he was not singled out for extra pay. But he never qualified for extra pay, and no one with the authority to award it to him promised to deliver. Also, Stone

voted for the person who was designated the contractor, and it is difficult to see how a failure to single out a plaintiff for special treatment among other employees amounts to a denial of equal protection of the law, even if the court assumes any person was acting under color of state law in the matter.

4. *Conspiracy*. Stone asserts that there was a "conspiracy of silence" against him. This label is given to the meetings held by SRC to discuss Stone's performance inadequacies. There is no indication whatsoever of a conspiracy, of an unlawful purpose for these discussions, nor does the failure to issue warnings to Stone (especially in light of the many occasions on which the undisputed evidence shows he was counseled, instructed, and corrected in the performance of his duties) indicate an unlawful purpose or result.

In addition to lacking a plausible basis in fact, moreover, Stone's conspiracy theory suffers from a fatal legal flaw.

> [U]nder the intracorporate conspiracy doctrine a conspiracy cannot exist solely between members of the same entity. *Wright v. Illinois Dept. of Children & Family Services,* 40 F.3d 1492, 1508 (7th Cir. 1994). As we held in Wright, "managers of a corporation jointly pursuing its lawful business do not become 'conspirators' when acts within the scope of their employment are said to be discriminatory." *Id.* (citations omitted); *see also Hartman v. Board of Trustees of*

> *Community College,* 4 F.3d 465,470 (7th Cir. 1993); *Doe v. Board of Education of Hononegah School Dist.,* 833 F. Supp. 1366, 1381 (N.D. Ill. 1993).

Payton v. Rush-Presbyterian-St. Luke's Medical Center, 184 F.3d 623,632 (7th Cir. 1999).

5. *ADA and FMLA.* There are references in the parties' briefs to the Americans with Disabilities Act, 42 U.S.C. 8 § 12,101-12, 213, and the Family and Medical Leave Act, 29 U.S.C. § 2601, *et seq.* No substantive analysis of possible claims under those legislative enactments is needed here because claims under the ADA and the FMLA were not included in the amended complaint and hence are not part of this action.

6. *Age Discrimination.* Stone asserts a claim under the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 621, *et seq.* The ADEA makes it "unlawful for an employer... to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age." 29 U.S.C. § 623(a)(1). The protected class is employees forty years of age and over. *Id.* at § 631.

> The purpose of the ADEA is "to promote employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment; to help employers and workers find ways of meeting

problems arising from the impact of age on employment." 29 U.S.C. § 621(b). Effectuating this purpose, the ADEA prohibits employers from discriminating against employees who are at least forty years old based on their age. 29 U.S.C. 88 623(a), 631(a). "A plaintiff seeking relief under the ADEA must establish that he would not have been treated adversely by his employer 'but for' the employer's motive to discriminate against him because of his age." *Baron,* 195 F.3d at 338. An employer's age discrimination may be proven by a showing of direct evidence of the employer's motive to discriminate or through circumstantial evidence and the indirect burden-shifting framework set out in *McDonnell Douglas Corp. v. Green,* 411 U.S. 792, 802, 93 S. Ct. 1817, 36 L.Ed.2d 668 (1973). *See Baron,* 195 F.3d at 338. Under the burden-shifting framework a plaintiff must first establish, by a preponderance of the evidence, a *prima facie* case of discrimination. *See id.* at 339. If a plaintiff is able to meet this initial burden, then the burden shifts to the defendant to provide "evidence of a legitimate and nondiscriminatory reason for the employment decision." *Robin v. Espo Eng'g Corp.,* 200 F.3d 1081, 1088 (7th Cir. 2000). If the defendant provides such a reason, then the plaintiff must prove, by a preponderance of the evidence, that the defendant's stated reason for

> the employment decision is merely a pretext for discrimination. *See Jackson v. E.J. Brach Corp.*, 176 F.3d 971,983 (7th Cir, 1999).

Wade v. Lerner New York, Inc., 2001 WL 210178, *2 (7th Cir. March 5, 2001); see also *Radue v. Kimberly-Clark Corp.*, 219 F.3d 612, 617 (7th Cir. 2000).

Stone has not come forward with any direct evidence of age discrimination, so he must rely on the indirect method of proof. A *prima facie* case under the ADEA tracks the elements of the case under Title VII. Stone must show that (1) the plaintiff is within the protected group, *i.e.*, over the age of 40, (2) the plaintiff's work performance met his employer's legitimate expectations, (3) the plaintiff suffered an adverse employment action, and (4) a substantially younger employee was treated more favorably. *Vanasco v. National-Louis Univ.*, 137 F.3d 962, 965 (7th Cir. 1998). And again, where Stone claims a failure to promote or hire, the second element becomes whether he was qualified for the position in question.

Stone is a member of a protected class. His employment with SRC was terminated and the SRC and Citizens Gas failed to promote/hire him on various occasions after his initial employment with SRC in September 1996. In some instances, at least, individuals under age 40 appear to have been selected for the positions Stone sought. As with Stone's Title VII claim, the court assumes he can show a prima facie case on his termination claim, but he has not done so with respect to any of the other decisions in question. Stone "has to do more than show that by his own standards he should have been treated better." *Kuhn v. Ball State Univ.*, 78

F.3d 330, 331-32 (7th Cir. 1996).

Once again, as with the other statutory claims, even if Stone has established a *prima facie* case, he encounters the remainder of the burden-shifting analysis. SRC and the other business entities named as defendants have provided evidence of legitimate and nondiscriminatory reasons for the challenged employment decisions. *See Paluck v. Gooding Rubber Co.*, 221 F.3d 1003, 1009 (7th Cir. 2000).

These are the same reasons that apply to Stone's Title VII claim, and this places on Stone the obligation to rebut the defendants' reasons by proving that there were merely pretext for discrimination. *Id.*

> A plaintiff can establish pretext "directly with evidence that [an] employer was more likely than not motivated by a discriminatory reason, or indirectly by evidence that the employer's explanation is not credible." *Jackson v. E.J. Brach Corp.*, 176 F.3d 971,983 (7th Cir. 1999) (citations omitted).

Wade v. Lerner New York, Inc., 2001 WL 210178, at *2. Using indirect evidence, an age discrimination plaintiff may establish that the employer's stated reason for the adverse employment action was merely a pretext for discrimination by showing that the employer's stated reason is: (1) factually baseless; (2) not the actual motivation for the discipline; or that it is (3) insufficient to motivate the discipline. *See id.* It has been explained that

> the issue of pretext does not address the correctness or desirability of reasons offered for employment decisions. Rather, it addresses the issue of whether the employer honestly believes in the reasons it offers.

McCoy v. WGN Cont 'l Broad. Co., 957 F.2d 368, 373 (7th Cir. 1992). So long as SRC and Citizens Gas "honestly believed in the nondiscriminatory reason[ ] [they] offered," it is irrelevant whether these entities terminated Stone and failed to hire him in certain positions for the substandard performance and lack of qualifications they attributed to Stone. *Hartley v. Wis. Bell, Inc.*, 124 F.3d 887, 890 (7th Cir. 1997); *see also Pitasi v. Gartner Group, Inc.*, 184 F.3d 709, 718 (7th Cir. 1999) ("[I]t is not sufficient for the employee to show that his employer fired him for incorrect or poorly considered reasons. He must establish that the employer did not honestly believe the reasons it gave for terminating him.").

Stone has not come forward with admissible evidence creating a genuine issue of fact as to whether the reasons given for his termination and his non-hiring were merely false pretexts for discrimination against him on the basis of his age.

7. *Claims under Indiana Law*. Stone brings a number of claims under Indiana law. The court has jurisdiction over such claims through supplemental jurisdiction, conferred by 28 U.S.C. § 1367(a). This statute codifies the principle that the federal courts' original jurisdiction over federal questions carries with it jurisdiction over state law claims that "derive from a common nucleus of operative fact," such that "the

relationship between [the federal] claim and the state claim permits the conclusion that the entire action before the court comprises but one constitutional 'case.'"

City of Chicago v. International College of Surgeons, 522 U.S. 156, 164-65 (1997) (quoting *United Mine Workers v. Gibbs,* 383 U.S. 715, 725 (1966)).

When a district court dismisses the claims over which it had original jurisdiction, it has discretion either to retain jurisdiction over the supplemental claims or to dismiss them. Supplemental jurisdiction is not a plaintiff's right. *Kennedy v. Schoenberg, Fisher & Newman, Ltd.,* 140 F.3d 716, 717 (7th Cir.), *cert. denied,* 119 S. Ct. 167 (1998). The Court of Appeals for the Seventh Circuit has frequently noted that the general rule is to dismiss the supplemental state claims without prejudice when the federal claims are dismissed prior to trial. *Id.* at 727. It is also true, however, that in determining whether to retain jurisdiction over the supplemental state claims or require the plaintiff to litigate them in state court when the federal claims are dismissed prior to trial, the district court must "choose the course that 'best serves the principles of economy, convenience, fairness and comity which underlie the pendent jurisdiction doctrine.'" *Centres, Inc. v. Town of Brookfield, Wis.,* 148 F. 3d 699, 704 (7th Cir. 1998) (quoting *City of Chicago v. International College of Surgeons,* 118 S. Ct. 523,533 (1997)(internal quotation omitted)).

Having considered the principles of economy, convenience, fairness and comity, and relying here specifically on the extensive evidentiary materials which have

been developed, submitted, and evaluated by the parties, the court will exercise supplemental jurisdiction over Stone's state law claims in this case. The proper resolution of Stone's state law claims is clear, and there is no point in burdening the state courts with further litigation of those claims. *See, e.g., Van Harken v. Chicago,* 103 F.3d 1346, 1354 (7th Cir. 1997).

Stone claims in Counts VII and VIII of the amended complaint that he was the victim of intentional infliction of emotional distress, which is a tort committed by "one who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another" *Ledbetter v. Ross,* 725 N.E.2d 120, 123-24 (Ind. App. 2000) (quoting *Cullison v. Medley,* 570 N.E.2d 27, 31 (Ind. 1991)); *Pohle v. Cheatham,* 724 N.E.2d 655,659 (Ind. App. 2000).

The circumstances constituting the basis of these claims were fully explored during Stone's deposition. He recited a few occasions on which his work had been criticized in a manner that made him "angry and upset," and that on one occasion a vulgar comment had been directed toward someone else. This is not "extreme and outrageous conduct," and no rational jury could find otherwise.

Stone claims in Count XIV of his amended complaint that he has been victimized through retaliatory discharge, which can be actionable under Indiana law if the discharge was in response to certain conduct protected by law. Stone has invested much effort into depicting his employment with SRC as his personal crusade to bring the operation of SRC to comply with his understanding of state law and business

standards. Indeed it may have been. It does not follow, however, that he has suffered an actionable wrong:

> The State of Indiana recognizes two categories of employment employment for a definite term and employment-at-will. *See Orr v. Westminster Village North, Inc.*, 689 N.E.2d 712, 717 (Ind. 1997). If employment is at-will, it "is presumptively terminable at any time, with or without cause, by either party." *Id.; see also Wior v. Anchor Indus., Inc.*, 669 N.E.2d 172, 175 (Ind. 1996). In its most recent explication of the at-will doctrine, *Orr,* the Supreme Court of Indiana recognized three exceptions to that doctrine, three ways to rebut the presumption that the employment is at-will and thus to require the employer to show good cause for termination: (1) adequate independent consideration; (2) public policy; and (3) promissory estoppel. *Id.* at 718.

Groce v. Eli Lilly & Co., 193 F.3d 496, 502 (7th Cir. 1999). As was the case in *Groce,* Stone was an at-will employee (still in his 12-month probationary period) and has not identified an established public policy exception to SRC's freedom to terminate that employment at any time.

Stone contends that his medical needs were inadequately met by SRC in relation to injuries Stone suffered in the course of his employment. This claim is asserted in Count XV of the amended complaint. The Indiana Worker's Compensation Act provides for compensation to employees

who receive injuries on the job. See Ind. Code § 22-3-3-10. Ind. Code § 22-3-2-6 states that the rights and remedies granted to an employee under the statute exclude all other rights and remedies of such employee.

Several of Stone's pendent state law claims assert torts premised on his wrongful termination, aimed directly at SRC or at SRC's managers or Citizens Gas. The court has concluded that the termination of Stone's employment and his treatment during the course of his employment were not wrongful under either federal or state law. This conclusion pretermits the need for further discussion of these alleged torts against Stone.

Finally, the court notes that Stone relies heavily on the fact that he prevailed in his effort to win unemployment compensation benefits. Citing *University of Tennessee v. Elliott,* 478 U.S. 788, (1986), Stone contends that the decision shows he was discharged without just cause, or at least that the decision raises a genuine issue on the point. Indiana courts do not give such decisions any weight in separate litigation, however, so federal courts also do not. *See McClendon v. Indiana Sugars, Inc.,* 108 F.3d 789, 798 (7th Cir. 1997). The outcome of the unemployment compensation proceeding has no effect in this case.

IV. *Conclusion*

"Employers may act for many reasons, good and bad; they may err in evaluating employees' strengths; unless they act for a forbidden reason, these errors (more properly, differences in assessment) do not matter." *Kuhn v. Ball State*

Univ., 78 F.3d 330, 332 (7th Cir. 1996). A court in which a Title VII claim is brought

> do[es] "not sit as a super-personnel department that reexamines an entity's business decisions." *Dale v. Chicago Tribune Co.*, 797 F.2d 458,464 (7th Cir. 1986). We do not determine whether the employer exercised prudent business judgment. We determine only whether [the employer's].., decision actually involved [the reasons articulated by the employer].., and was genuinely and honestly made.

Williams v. Williams Electronics, Inc., 856 F.2d 920, 924 (7th Cir. 1988).

SRC discharged Stone for his inability to perform adequately the duties and responsibilities of the service mechanic position. In doing so, neither SRC nor its employees committed any actionable wrong against Stone. SRC and Citizens Gas failed to hire Stone for positions which were advertised. When those positions were filled, in each instance it was by a candidate possessing greater qualifications for the position than Stone, who could be said to have the qualifications only through the most tenuous of reasoning. Finally, SRC did not retaliate against Stone based on Stone having filed discrimination complaints with the EEOC. Stone's arguments against these conclusions rest not on facts but on his opinion and conjecture concerning motivation. This will not suffice to defeat the defendants' motion for summary judgment, for

> [i]n ruling upon a Rule 56 motion, "a District Court must resolve any factual issues of controversy in favor of the non-moving party" only in the sense that, where the facts specifically averred by that party contradict facts specifically averred by the movant, the motion must be denied. That is a world apart from "assuming" that general averments embrace the "specific facts" needed to sustain the complaint... .The object of [Rule 56(e)] is not to replace conclusory allegations of the complaint or answer with conclusory allegations of an affidavit.

Lujan v. National Wildlife Fed'n, 497 U.S. 871,888 (1990).

The defendants' motion for summary judgment is therefore granted, and judgment consistent with this Entry shall now issue. Other motions are resolved as described in Part II of this Entry. The costs of this action are assessed against the plaintiff.

So ordered.

Date: March 30, 2001

/s/ _____
DAVID F. HAMILTON, JUDGE
United States District Court
Southern District of Indiana

District Court Entry on
Pending Motions - 3/30/01

Copies to:

Bradley Wilson
Susan B. Tabler
Ice Miller
One American Square
P.O. Box 82001
Indianapolis, IN 46282

Alfred L. Stone
6735 Sparrowood Boulevard
Indianapolis, IN 46236

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 00-2356
[Submitted October 23, 2000*]
Decided October 24, 2000]

ALFRED L. STONE,
Plaintiff-Appellant,

v.

CITY OF INDIANAPOLIS PUBLIC UTILITIES DIVISION, d/b/a CITIZENS GAS & COKE UTILITY, et al.,
Defendants-Appellees.

Appeal from the United States District Court
for the Southern District of Indiana,
Indianapolis Division
No. IP 99-0590 C-M/S
Larry J. McKinney, Judge

* After an examination of the briefs and the record, we have concluded that oral argument is unnecessary. Thus, the appeal is submitted on the briefs and the record. *See* Fed. R. App. P. 34(a)(2).

JUDGES:

Before Hon. WILLIAM J. BAUER, Circuit Judge, Hon. MICHAEL S. KANNE, Circuit Judge, Hon. TERENCE T. EVANS, Circuit Judge.

ORDER

After being terminated from his employment, Alfred J. Stone filed this lawsuit alleging violations of the Americans with Disabilities Act and Title VII of the Civil Rights Act of 1964. The district court entered summary judgment against Stone, finding that he was not entitled to protection under the ADA because he is not disabled, and that he had not made out a prima facie case of showing that he had been terminated in retaliation for filing charges with the Equal Employment Opportunity Commission (EEOC). Stone appeals, and we affirm.

I.

Stone is an African-American male, hired by Citizens Mechanical Services as a service mechanic in September 1996. His duties included installing and repairing water heaters and boilers, as well as connecting gas lines. Pursuant to a collective bargaining agreement, Stone was considered a probationary employee who could be discharged with or without cause during the first twelve months of his employment.

During the summer months of 1997, Stone received several verbal warnings and reprimands from his supervisor David Martin for inappropriate conduct on the job. Martin spoke with Stone on many occasions about various infractions: improperly calculating customers' bills, not

completing jobs in a timely manner, not submitting order forms for all jobs, failing to use a U-gauge when testing for a gas leak, not reporting to Citizens when leaving a job site or taking a lunch break, not informing customers when he was leaving. Perhaps the most serious error occurred in early July 1997, when Stone failed to properly remove an [*3] old shut-off valve from a gas stove at a customer's residence, and a gas leak resulted. After this incident, Martin counseled Stone about his carelessness.

On July 23, 1997, Stone injured his back while installing a heat exchange. Citizens' occupational health nurse, Victoria Barlow, gave Stone anti-inflammatory medicine and icepacks for the injury. Barlow told Martin that Stone was not to perform any job that required lifting, and Martin in turn assigned Stone to light duty work.

On August 4, 1997, at Stone's request, Barlow instructed Martin to purchase a Sacro-Ease seat support unit that Stone wished to place in his truck to absorb some of the shock that he experienced while riding in his company vehicle. To obtain a prescription for the unit, Martin asked Stone to visit his personal physician at the VA Medical Center. On August 6, 1997, Stone presented Martin with a prescription for the Sacro-Ease unit as well as a note from Stone's doctor at the VA Medical Center instructing that Stone was not to return to work until August 8.

When Barlow learned of Stone's visit to the VA Medical Center, she promptly made an appointment for him to be evaluated at St. Vincent Hospital. A doctor examined Stone, diagnosed lower back strain, and authorized Stone to return to work without limitations on August 7. Stone

returned to work on August 7, and performed light duty. On August 13, Stone returned to St. Vincent for a follow-up examination. Another doctor examined Stone and cleared him to return to work without limitations the next day.

On August 24, 1997, Stone submitted a request for leave to begin October 1. Without explanation, Stone stated that he was entitled to such leave pursuant to the Family and Medical Leave Act (FMLA).

Citizens decided to terminate Stone on August 25. When Stone arrived for work the next day, Citizens told him of their decision and gave him written notification that he was being discharged for his "inability to adequately perform the duties and responsibilities of [his] position to standards acceptable by [Citizens]."

After receiving a right to sue letter from the EEOC, Stone then filed this complaint, alleging that Citizens and several of its parent corporations violated the Americans With Disabilities Act, *see* 42 U.S.C. § § 12, 101-12,213, and Title VII of the Civil Rights Act of 1964, *see* 42 U.S.C. § 2000 (e) *et seq*. He alleged that Citizens violated the ADA in three ways: terminating him because of his disability, failing to provide reasonable accommodation for his back condition by granting his leave request, and making discriminatory statements to an Indiana Administrative Law Judge ("ALJ") in connection with Stone's application for unemployment compensation. Additionally, Stone alleged that Citizens violated Title VII by terminating him because of his race and terminating him in retaliation for several charges of discrimination Stone had filed with the EEOC.

The district court granted summary judgment for Citizens. The court determined that Stone could not establish his ADA claims because he did not show that he was substantially limited in one or more of the major life activities as required by the ADA. The court found that, although Stone's back injury could affect his ability to work as a gasoline mechanic or a plumber, Stone had not shown that he was unable to find employment in another field. With respect to Stone's Title VII retaliation claims, the court noted that Stone had not established a sufficient causal link between his EEOC filings and his termination. Finally, the court held that Stone had failed to adequately develop or support allegations in his complaint that he was fired because of his race, and declined to address that claim further. Stone appealed.

II.

We review a grant of summary judgment de novo. *See Wright v. Illinois Dep't of Corrections*, 204 F.3d 727, 729 (7th Cir. 2000). Summary judgment is appropriate when the "pleadings, depositions, answers to interrogatories, and admission on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986). In deciding if there is an issue of material fact, we consider the record and draw all inferences in the light most favorable to Stone. *See Robin v. Espo Eng'g Corp.*, 200 F.3d 1081, 1088 (7th Cir. 2000). To avoid summary judgment, Stone needed to produce evidence showing that an issue of material fact existed. *See Silk v. City of Chicago*, 194 F.3d 788, 798 (7th Cir. 1999). He was required to proffer "more than a

scintilla of evidence to support [his] position." *Bekker v. Humana Health Plan, Inc.*, 229 F.3d 662, 669 (7th Cir. 2000).

A. ADA Claims

On appeal, Stone argues, with regard to his ADA claims, that the district court erred in overlooking genuine issues of fact as to whether he suffered a substantial impairment of a major life activity. Under the ADA, an individual is disabled if he (1) has a physical or mental impairment that substantially limits one or more of the major life activities, (2) is regarded as having such impairment, or (3) has a record of such impairment. *See* 42 U.S.C. § 12102(2)(A). A substantial limitation on the major life activity of working involves more than the "inability to perform a single, particular job." 29 C.F.R. § 1630.2(j)(3)(i). For an impairment to substantially limit Stone's working ability, he must provide evidence that he was substantially limited in employment generally. *See Sinkler v. Midwest Property Management Ltd. Partnership*, 209 F.3d 678, 685 (7th Cir. 2000). Stone must show that he was "significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills and abilities." *Id.; see also Talanda v. KFC Nat'l Management Co.*, 140 F.3d 1090, 1097 (7th Cir. 1998).

Stone points to several pieces of evidence that he contends established a genuine issue of material fact as to whether he suffered a substantial impairment of a major life activity. First, he notes the St. Vincent doctor's report of August 13 clearing him to return to work without limitation--a

report that reflected that his injury was improved but not resolved. Because his back injury was not resolved, Stone asserts, he was substantially limited. Stone bases this argument on a section of the doctor's report asking the doctor to assess the degree of injury based upon four possible standards: resolved, improved, no change, worsened. Stone's doctor checked the "improved" box, indicating, Stone reasons, that the back injury was not resolved--and therefore he is still limited in his working activities. The doctor's response, however, does not create a genuine issue as to Stone's inability to work in a broad range of jobs; it [*9] suggests merely that Stone's injury was in a better condition than it had been during previous examinations.

Next, Stone challenges the district court's conclusion that a report from Dr. R.A. Hutson, an orthopedic physician at the Circle City Health Center, fails to establish that he is substantially limited in his ability to work. Dr. Hutson's report, dated September 16, 1998, assessed Stone's limitations and determined that Stone should not lift more that 25 pounds occasionally and 10 pounds frequently and that Stone should avoid repeated twisting. As the district court concluded, however, the doctor's report alone does not raise a genuine issue as to Stone's substantial limitation in working. The report does not demonstrate how Stone's back injury limited his ability to perform an "entire class or broad range of jobs." *Sinkler*, 209 F.3d at 685. Indeed, Stone admitted in his deposition that, after his discharge, he continued to perform plumbing and mechanical work on an ad hoc basis. Additionally, Stone must demonstrate that he was disabled at the time of the adverse employment action. *See Bay v. Cassens Transport Co.*, 212 F.3d 969, 974 (7th Cir. 2000). Around the time of his discharge, however, a doctor had

cleared Stone to return to regular duty work without restrictions, whereas Dr. Hutson did not issue his report until more than one year after Stone was terminated.

Stone also challenges the district court's ruling not to admit into evidence a copy of a particular affidavit, which, he contends, bolsters his argument that his back injury substantially limited his ability to perform certain duties as a service mechanic. This affidavit, prepared by a customer named Elwood Black, stated that Stone was working on the water heater and gas line at Black's residence, when Stone experienced back problems that prevented him from bending down to light a furnace and caused him pain while trying to carry the furnace out of the basement. Even if the district court abused its discretion in excluding this affidavit, the error was harmless because the affidavit ultimately fails to show that Stone cannot perform a broad class of jobs.

Stone's final two arguments are that the district erred by not applying the ADA to his FMLA request and by not admitting his leave request into evidence. We need not reach these questions, however, because Stone cannot show he is disabled. Because Stone is not entitled to relief under the ADA, the issue of reasonable accommodation does not arise in this case.

B. Title VII Claims

1. Retaliation

Stone filed several charges of discrimination with the EEOC during March and April 1997, alleging that Citizens discriminated against him by not hiring him for various

internal positions for which he had applied. Stone maintains that he was ultimately terminated in retaliation for filing these charges. The district court found no causal link between Stone's EEOC filings and his termination four months later. According to the court, too much time separated the two events and, furthermore, Citizens had legitimate grounds on which to fire Stone.

"Title VII prohibits discrimination against employees who oppose unlawful employment practices or participate in any charge or investigation under the Act." *Hunt-Golliday v. Metropolitan Water Reclamation Dist. of Greater Chicago*, 104 F.3d 1004, 1014 (7th Cir. 1997); *see also* 42 U.S.C. § 2000e-3(a). To avoid summary judgment on a retaliation claim, a plaintiff must demonstrate that he suffered an adverse employment action as the result of engaging in a protected activity by complaining about discriminatory practices. *See Paluck v. Gooding Rubber Co.*, 221 F.3d 1003, 1009 (7th Cir. 2000).

On appeal, Stone contends that evidence before the district court did establish a causal link for retaliation. Stone points to the suspicious timing of his termination, arguing that a causal link could be found because all the incident reports in his file were dated after he filed EEOC charges. We recognize that a causal link may be established by a showing that the discharge occurred closely following a protected activity. *See Paluck*, 221 F.3d at 1009 (noting that the timing of discharge may constitute circumstantial evidence of retaliatory motive). If, however, the time between the protected activity and the discharge becomes too great, "additional proof of a causal nexus is necessary." *Davidson v. Midelfort Clinic, Ltd.*, 133 F.3d 499, 511 (7th Cir. 1998).

Stone's termination came four months after he filed his EEOC charges, and we have held that a four-month time gap is too long to sufficiently raise an issue as to any causal link. *See Filipovic v. K & R Express Sys., Inc.*, 176 F.3d 390, 398-99 (7th Cir. 1999).

Further, Stone claims that the lack of written disciplinary warnings bolsters his retaliation claim by negating any legitimate grounds on which Citizens may have relied in firing him. He relies on "Work Rules for the Employees of Citizens Gas & Coke Utility," which provide that "when an action by an employee is such as to result in a warning which in the future may be used in considering more severe disciplinary action, such warning shall be in writing and one (1) copy of such written warning shall be given to the employee . . . ." This argument, however, overlooks the fact that Stone received considerable negative verbal feedback about problems with his work. More significantly, this argument does not relieve Stone of his burden to first demonstrate a prima facie case of retaliation.

Additionally, Stone argues that the district court erred by not deferring to an ALJ's determination in a separate unemployment benefits proceeding that Stone was not fired for just cause. The ALJ's ruling, however, is not conclusive or binding authority for this court; the Indiana administrative proceedings involved burdens of proof and substantive issues that are distinctly different from those in Title VII litigation. *See McClendon v. Indiana Sugars, Inc.*, 108 F.3d 789, 798 (7th Cir. 1997).

2. Race

Finally, Stone renews his contention that he was discharged because of his race. Because he did not develop this claim in the district court, however, he waived that claim for purposes of this appeal. *See Varner v. Illinois State Univ.*, 226 F.3d 927, 2000 WL 1257266, at *9 (7th Cir. 2000).

III.

For the reasons stated above, we AFFIRM the district court's grant of summary judgment in favor of Citizens.

APPENDIX F

John O. Moss, Esq.
700 Inland Building
156 East Market Street
Indianapolis, Indiana 46204
Office: (317) 635-1945
Fax: (317) 635-6930

June 21, 1999

Susan B. Tabler
Ice Miller Donadio and Ryan
One American Square
P.O. Box 82001
Indianapolis, IN 46204

Alfred L. Stone v. Citizen's Gas and Coke Utility, et al.
Cause No. IP 98-0190-C-G/H

Dear Attorney Tabler:

Enclosed are the documents that the Plaintiff promised to give to you numbered 1-54 (numbered for the purpose of this communication only).

Respectfully,

/s/ _____
John O. Moss
John O. Moss & Associates

STATE OF INDIANA
DEPARTMENT OF
WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

DECISION OF ADMINISTRATIVE LAW JUDGE

Case Number: 97-18998
S.S.: 305-54-0382
Local Office: Indianapolis - East
B.Y.E.: 8/22/1998
Mail Date: 11/15/1997

In the Matter of:

Claimant,
ALFRED L STONE
6731 SPARRWOOD BLVD
INDIANAPOLIS, IN 46236-
Local Office: Indianapolis - East

Employer,
SERVICE & RENTAL CENTER LLC
2150 MARTIN LUTHER KING JR
STREET
INDIANAPOLIS, IN 46202-

Issue: Whether the employer discharged the claimant for just cause. IC 22-4-15-1(d) (1-8).

Indiana Department of Workforce Development
Unemployment Insurance Appeals
Decision of Administrative Law Judge

CONFIDENTIAL RECORD PURSUANT
TO IC 22-4-19-6, IC 4-1-6

This decision will become final unless the claimant or employer involved appeals to the Review Board within eighteen days after the mailing date of this decision. The appeal should be filed at the local office nearest the claimant or employer.

SUMMARY OF CASE: On Wednesday, September 24, 1997, the Employer filed an appeal to the deputy's determination mailed or otherwise delivered on Friday, September 19, 1997. Administrative Law Judge ROBERT K. ROBISCH conducted a hearing in Indianapolis, IN, at 9:15 am on Tuesday, November 04, 1997. Appearing at the hearing was the claimant in person. The employer was represented by Dennis W. Rosier, Compensation & Labor Relations Administrator, and David J. Martin, Supervisor.

Decision - Affirmed

FINDINGS OF FACT: The employer is a subsidiary of Citizens Gas and Coke Utility. The employer's operation is engaged in the installation of commercial water heaters, boilers, and similar equipment. The claimant worked for the employer from September 23, 1996 through August 25, 1997 as a service and rental center mechanic. The employer discharged the claimant for the inability to adequately perform the duties and responsibilities of his position. The employer discharged the claimant by written notice dated August 26, 1997, informing the claimant that his termination was

effective August 25, 1997.

Pursuant to the union agreement, union employees of the employer are on a probationary period for one year. The claimant was on such a probationary period. During the period of employment, the employer's supervisor wrote up a number of internal memos relating to incidents involving the claimant with which the supervisor was not satisfied. The supervisor did discuss the situations with the claimant; however, no written warnings were given to the claimant by the employer. According to the employer's work rules, introduced into the record by the employer, under Article 3-Forms of Disciplinary Action, the rules provide that when an action by an employee is such so as to result in a warning which in the future may be used in considering more severe disciplinary action, the warning shall be in writing, and a copy will be given to the claimant. Although the employer never issued a written warning to the claimant, the various verbal counselings of the claimant by his supervisor, reflected in the memos to the personnel file, were utilized in determining that the claimant should be discharged. Although the final incidents involving the claimant which the employer utilized in making the discharge determination were written up in personnel file memos on July 24, 1997, the claimant was not discharge until one month later, as the employer was reviewing the claimant's situation with legal counsel in light of EEOC complaints being filed, and also with the Human Resources Department of Citizens Gas and Coke Utility.

CONCLUSIONS OF LAW: According to IC 22-4-151 (d): 'discharge for just cause is used in this section is defined to

include but not be limited to: ... any breach of duty in connection with work which is reasonably owed an employer by an employee.' The burden of establishing that the discharge of an employee is for just cause is upon the employer. Delco Remy v. Review Board (1987), Ind. App., 503 N.E.2d 1251; Wakshlag v. Review Board (1980), Ind. App., 413 N.E.2d 1078. The burden is upon the employer to establish a prima facie showing of just cause for the termination. Best Lock Corp. v. Review Board (1991), Ind. App., 572 N.E.2d 520.

In the present case, the employer has established on the record that it was not satisfied with the work performance of the claimant. Although the claimant's supervisor gave him a number of verbal counselings, which were recorded in writing for the claimant's personnel file, the claimant was never issued a written warning by the employer. The work rules introduced into the record by the employer specifically indicate that if employee unsatisfactory conduct has the potential of being utilized in the future for disciplinary purposes, the employee must be issued a written warning, a copy of which is to go to the employee. As stated previously, although the claimant's supervisor verbally counseled him on a number of occasions, recording these incidents in memos to the claimant's personnel file, the employer never issued a written warning to the claimant for unsatisfactory conduct. From such action, or lack thereof, the Administrative Law Judge determines that the employer did not consider any of the claimant's incidents in question severe enough to warrant written discipline. The administrative Law Judge also does not consider the incidents in question to constitute recurring

gross negligence or willful misconduct on the part of the claimant so as to warrant discharge under Meulen vs. Review Board, (1988), Ind. App., 527 N.E. 2nd 729.

Therefore, the Administrative Law Judge finds that the employer has failed to conclusively establish that the claimant engaged in conduct sufficient to warrant discharge, has therefore failed to sustain its burden of proof, and has failed to establish a prima facie showing of just cause for the discharge under IC 22-4-15-1.

DECISION: The initial determination of the deputy is affirmed. The claimant was not discharged for just cause. No penalties are imposed under Chapter 15, Section 1 of the Act. The Claimant, unless otherwise disqualified, is entitled to his benefits.

DATED: INDIANAPOLIS, INDIANA ON THIS 4th DAY OF NOVEMBER, 1997.

/s/ _____
ROBERT K. ROBISCH
ATTORNEY AT LAW
ADMINISTRATIVE LAW JUDGE

RR/hh 11/5/1997

APPENDIX G

STATE OF INDIANA
COUNTY OF MARION

[Dated January 10, 2000]

AFFIDAVIT OF DAVID PHELAN

1. I, David Phelan, being duly sworn says,

2. I am over the age of twenty one (21) years, and I have personal knowledge of the below stated facts.

3. I worked for the Service & Rental Center, and the Service & Rental Center LLC. as a leased employee of Citizens Gas & Coke Utility.

4. I am registered as a licensed plumbing contractor with the State Indiana, and prior to 1996, I contracted with the Service and Rental Center to use my plumbing license to obtain plumbing permits to install water heaters.

5. For the use of my license to obtain plumbing permits, Citizens Gas & Coke Utility paid me addition money on the hour, the cost of my insurance, and they also paid the bi-annual renewal fees for my plumbing license to the State of Indiana.

6. During my leased employment with the Service & Rental Center, Pat O'Pelt was the Manager, and in 1996 Steve Stark. V.P. of Citizen Gas & Coke Utility took over the

responsibility of the day to day operations of the company, prior to and after the incorporation of SRC.,LLC. in August 1, 1996.

7. Pat O'Pelt and Steve Stark-V.P. of Citizens Gas & Coke Utility had personal knowledge that my license was being used to obtain plumbing permits for the installation of water heaters prior to and August 1, 1996.

8. During my employment as a leased employee of the Service & Rental Center, Robert King, Frank McMahon, and myself, all members of the majority race, injured our backs. However, our employer Citizens Gas & Coke Utility did not terminate our employment as a result thereof the injury to our backs.

9. During my tenure of employment with Citizens Gas and the Service & Rental Center, David Martin was not licensed as a plumber with the State of Indiana. An Indiana plumbing license was a requirement for the union position of technical advisor because you had to layout, and estimate the cost to install water heaters for customers. In addition, Martin could not hold the position of technical advisor because all Citizens Gas employees, in order to be promoted, had to pass a baseline examination with a score of 250 or better. Martin only scored 214 on the exam.

10. Neither Pat O'Pelt-Manager, Ralph Moore-Salesman, or David Martin-Technical Advisor, all members of the majority race, possessed a bachelors degree from an accredited university, or an Indiana plumbing license.

11. In 1996, with the approval of Pat O'Pelt-Manager and Steve Stark-President, the Service & Rental Center LLC. paid for the educational courses, license renewal fees and insurance for Daniel Canter, and the renewal fees and insurance for Mike Montgomery and Ron Yates, in exchange for the use of their plumbing license to obtain permits to install water heaters.

12. In 1996 or 1997, the Service & Rental Center LLC. did not pay for any educational courses, insurance or for the bi-annual renewal fees for Alfred L. Stone's plumbing license.

13. David Martin performed most of the sales work, as it relates to estimating and technical advisement for the Service & Rental Center LLC to install water heaters and boilers for customers from November 1996 to May 1997.

14. I was never disciplined or counseled by David Martin for taking to long at a customer's house in Ravenwood, in May 1997. I was the driver of track number 334, and Alfred L. Stone was only a passenger. The customer sought technical advise about her hot water heater and the water system. We advised her according to the local plumbing code, and this was part of our responsibility under our job qualifications..

I swear under the penalty of perjury that the foregoing is true and correct to the best of my personal knowledge.

/s/ _____
David Phelan, Affiant

Affidavit of David Phelan - 1/10/00

STATE OF INDIANA
COUNTY OF MARION

Subscribed and sworn to before me on: January 10, 2000

/s/ _____
Susan M. Newell
Notary Public

My commission expires on: 8/13/06 Marion County

APPENDIX H

STATE OF INDIANA
COUNTY OF MARION

[Dated October 15, 1999]

AFFIDAVIT OF JEANINE DANIELS

1. I, Jeanine Daniels (f/k/a Adams,) being duly sworn says:

2. I am over the age of twenty-one (21) years, and I have personal knowledge of the below stated facts. 3. I worked as a dispatcher for the Service & Rental Center, LLC. from March 1997 to January 1998.

3. I worked as a dispatcher for the Service & Rental Center, LLC. from March 1997 to January 1998.

4. Leah McMahon was my immediate supervisor, and during my tenure of employment I was continuously subjected to disrespect, distrust, and humiliation by Ms. McMahon.

5. I complained to Pat O'Pelt, Thomas Derrow St, and Steve Stark, Vice President of Citizen Gas about Ms. McMahon's attitude toward me to no avail.

6. On or about June 1997, Dave Martin wrote up Charles Bavard for working on a personnel job on company time. The write up was placed in Mr. Bavard's personnel file along with another write up for being late.

7. During my tenure of employment service mechanic Ron Yates was written up more than once my Mr. Archer, but Mr. Yates was not terminated.

8. Mr. Bavard and Mr. Yates were probationary employees at the time, and both are members of the majority race.

9. Mr. Stone was the only African American service mechanic, but Mr. Stone was not written up by Martin or Archer during my tenure of employment.

10. Management of the Service & Rental Center LLC. was stratified. Steve Stark was the final voice on all matters, but Mr. Archer was over the service mechanics. Dave Martin was in the field most of time following up on sales calls that the office received.

11. Because of the way that Ms. McMahon treated me, I left my employment at the Service & Rental Center LLC., and I would not consider reemployment.

I swear under the penalty of perjury that the foregoing is true and correct to the best of my personal knowledge.

/s/ _____
Jeanine Daniels
Affiant

STATE OF INDIANA
COUNTY OF MARION

Subscribed and sworn to before me on: October 15, 1999

/s/ _____
Lynette S. Gwinn
Notary Public

My commission expires on: 3/9/00 Marion County